DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-751
Title: Fifth Third Bancorp, et al., Petitioners
v.
John Dudenhoeffer, et al.
Docketed: December 20, 2012
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (11-3012)
Decision Date: September 5, 2012
Rehearing Denied: October 12, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 14 2012	Petition for a writ of certiorari filed. (Response due January 22, 2013)
Jan 15 2013	Order extending time to file response to petition to and including February 22, 2013.
Jan 22 2013	Brief amicus curiae of Keycorp filed.
Jan 28 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for the petitioners.
Feb 22 2013	Brief of respondents John Dudenhoeffer, et al. in opposition filed.
Mar 5 2013	Reply of petitioners Fifth Third Bancorp, et al. filed.
Mar 6 2013	DISTRIBUTED for Conference of March 22, 2013.
Mar 25 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 12 2013	Brief amicus curiae of United States filed.
Nov 25 2013	Supplemental response filed by petitioners Fifth Third Bancorp, et al.
Nov 26 2013	DISTRIBUTED for Conference of December 13, 2013.
Nov 26 2013	Supplemental brief of respondents John Dudenhoeffer, et al. filed. (Distributed)
Dec 13 2013	Petition GRANTED limited to Question 1 presented by the petition.
Jan 8 2014	SET FOR ARGUMENT ON Wednesday, April 2, 2014
Jan 14 2014	Record received from U.S.C.A. 6th Circuit. The record is electronic.
Jan 27 2014	Joint appendix filed (3 volumes). (Statement of costs filed)
Jan 27 2014	Brief of petitioners Fifth Third Bancorp, et al. filed.
Jan 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jan 30 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.

Feb 3 2014	CIRCULATED.
Feb 3 2014	Brief amicus curiae of KeyCorp filed. (Distributed)
Feb 3 2014	Brief amicus curiae of Delta Air Lines, Inc. filed. (Distributed)
Feb 3 2014	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. (Distributed)
Feb 3 2014	Brief amicus curiae of Securities Industry and Financial Markets Association filed. (Distributed)
Feb 3 2014	Brief amicus curiae of ESOP Association filed. (Distributed)
Feb 26 2014	Brief of respondents John Dudenhoeffer, et al. filed. (Distributed)
Feb 26 2014	Letter proposing a lodging of material published in Tax Notes, March 2014, received from counsel for respondents. filed. (Distributed)
Feb 28 2014	Proposal of counsel for respondents to lodge copies of an unpublished article cited to in their brief on the merits.
Mar 4 2014	Brief amicus curiae of AARP filed. (Distributed)
Mar 5 2014	Brief amicus curiae of United States filed. (Distributed)
Mar 5 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 5 2014	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Mar 5 2014	Brief amici curiae of Law Professors filed. (Distributed)
Mar 21 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 24 2014	Reply of petitioners Fifth Third Bancorp, et al. filed. (Distributed)
Apr 2 2014	Argued. For petitioners: Robert A. Long, Jr., Washington, D. C. For respondents: Ronald Mann, New York, N. Y.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12-751

No. ____

Supreme Court, U.S.
FILED
DEC 14 2012
OFFICE OF THE CLERK

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING &
KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by holding that Respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan ("ESOP") abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, *et seq*. ("ERISA"), and every other circuit to address the issue.

2. Whether the Sixth Circuit erred by refusing to follow precedent of this Court (and the holdings of every other circuit to address the issue) by holding that filings with the Securities and Exchange Commission ("SEC") become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Sixth Circuit.

The Petitioners (Defendants/Appellees below) are:

Fifth Third Bancorp

Kevin T. Kabat

Members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include:

Paul L. Reynolds

Nancy Phillips

Greg D. Carmichael

Robert Sullivan

Mary Tuuk

The Respondents (Plaintiffs/Appellants below) are:

John Dudenhoeffer

Alireza Partovipanah

RULE 29.6 STATEMENT

Fifth Third Bancorp is a publicly traded company and has no parent company. No publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Fifth Third Bancorp, Kevin T. Kabat, and the members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan, and Mary Tuuk, respectfully petition this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 692 F.3d 410, and reproduced at App. 1-27. The opinion of the district court is reported at 757 F. Supp. 2d 753, and reproduced at App. 28-54. The order denying a petition for rehearing and rehearing en banc is not reported, but reproduced at App. 55-56.

JURISDICTION

The Sixth Circuit entered its judgment and opinion on September 5, 2012, and denied rehearing and rehearing en banc on October 12, 2012. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1104, reproduced at App. 57-65.

29 U.S.C. § 1106, reproduced at App. 66-67.

29 U.S.C. § 1107, reproduced at App. 68-80.

29 U.S.C. § 1108, reproduced at App. 81-114.

INTRODUCTION

The Sixth Circuit's decision in this case is contrary to three consistent decisions of the Second Circuit which dismissed ERISA breach of fiduciary duty claims challenging the decision of a fiduciary of an ESOP or eligible individual account plan ("EIAP") to remain invested in employer stock. On October 15, 2012, and November 13, 2012, respectively, this Court denied petitions for writs of certiorari in *Gray v. Citigroup, Inc.*, U.S., 11-1531, *Gearren v. McGraw-Hill Companies, Inc.*, U.S., No. 11-1550, and *Fisher v. JP Morgan Chase & Co.*, U.S., No. 12-298, allowing each of these decisions to stand. The Second Circuit held that ESOP and EIAP fiduciaries are entitled to a presumption of reasonableness with respect to the decision to invest in employer stock, which can only be overcome with plausible allegations that they abused their discretion by remaining invested in employer stock. In each case, the Second Circuit held that this presumption of reasonableness should be applied at the pleading stage. The Court found no abuse of discretion by the plan fiduciary because the plaintiffs failed to plausibly allege that their employer was in a "dire situation" that would have prompted a fiduciary to

remove employer stock as an investment option under the plans at issue.

The decision below is in direct conflict with the Second Circuit, as well as the Third and Eleventh Circuits, on this exact issue. The Sixth Circuit held that ESOP fiduciaries are not entitled to a presumption of reasonableness at the pleading stage and the court refused to apply the abuse of discretion standard in reviewing the decision of ESOP fiduciaries to remain invested in employer stock. App. 10-12. The court also refused to require plausible allegations that the employer was in a dire situation, or that its viability was threatened, to state a claim against ESOP fiduciaries. *Id.* at 12. The Sixth Circuit's holding not only conflicts with its sister circuits, it ignores fundamental principles of ERISA that specifically exempt ESOP fiduciaries from the duty to diversify plan investments. 29 U.S.C. § 1104(a)(2).

The decision below also created a conflict with the Second, Fifth and Eleventh Circuits on the issue of whether the mere incorporation by reference of SEC filings into plan documents constitutes a fiduciary act sufficient to form the basis for a breach of fiduciary duty claim under ERISA. In holding that mere incorporation by reference is enough, the Sixth Circuit ignored this Court's precedent, disregarded fundamental ERISA law, and imposed strict liability on fiduciaries for merely incorporating by reference securities filings which are legally required to be sent to plan participants.

The Court should grant certiorari and summarily reverse the decision below, or alternatively, grant

plenary review, to correct the Sixth Circuit's deviation from precedent of this Court and restore uniformity among the circuits with respect to these important and recurring questions of federal law.

STATEMENT OF THE CASE

1. Background

Fifth Third Bancorp ("Fifth Third") is a diversified financial services company headquartered in Cincinnati, Ohio, and among the largest money managers in the Midwest. App. 43. During the relevant period, Fifth Third had $119 billion in assets and operated 16 affiliates with 1,311 full-service Banking Centers. *Id.* At that time, Fifth Third was among the top 20 largest bank holding companies in the country.

Fifth Third sponsored the Fifth Third Bancorp Master Profit Sharing Plan ("Plan"), a defined contribution plan with a 401k feature. App. 30. Eligible Fifth Third employees were permitted to make voluntary contributions to the Plan and Fifth Third matched contributions up to 4% of each employee's pre-tax contribution. *Id.* Plan participants could direct the Plan to invest in any of 20 separate investment options. *Id.* The Plan document required that one investment option be the Fifth Third Stock Fund, which the Plan defined as an ESOP required to invest primarily in qualifying employer securities. *Id.* at 30, 35-36.

The Fifth Third Stock Fund qualified as an ESOP under ERISA. App. 33-37. While Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), generally requires

fiduciaries to diversify plan investments in order to minimize the risk of loss, Congress has specifically exempted ESOP fiduciaries from this diversification requirement in order to encourage ESOPs as a tool for corporate employees to own their employer's stock. 29 U.S.C. § 1104(a)(2). Congress expressly has warned against judicial rulings that impede this goal and treat ESOPs as "conventional retirement plans." 26 U.S.C. § 4975 (notes); *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983). Congress recognized that ESOPs were not intended to guarantee retirement benefits and decided that the policy of employee ownership was more important than short term investment gains. *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008).

2. Proceedings in the District Court

Respondents filed two separate class actions (later consolidated) against Fifth Third Bancorp, Kevin T. Kabat and members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee (collectively, "Defendants"). The consolidated complaint alleged that Defendants violated their fiduciary duties under ERISA by: (i) continuing to offer Fifth Third stock as a Plan investment option when it was imprudent to do so during the worldwide financial crisis of 2008; and (ii) making misrepresentations by incorporating by reference allegedly false and misleading SEC filings into plan documents.[1]

---

[1] In addition to their "prudence" and "misrepresentation" claims, Respondents brought several additional derivative claims, none of which are before the Court.

Respondents sought recovery for losses allegedly sustained by the Plan resulting from its investment in the Fifth Third Stock Fund during the putative class period, *i.e.* from July 19, 2007 through the present.

Respondents' complaint was based on conclusory allegations that Defendants knew or should have known that the greatest financial catastrophe since the Great Depression was coming, should have predicted its ultimate impact and should have completely sold off all Fifth Third stock in the Plan. Even in the face of Fifth Third's declining stock price during the worldwide financial crisis of 2008, however, Fifth Third's financial health remained strong and its stock "rebounded substantially" during the relevant period. App. 43.

The district court granted Defendants' motion to dismiss for failure to state a claim. The district court held that the Fifth Third Stock Fund is an ESOP, the fiduciaries of which were entitled to a presumption of reasonableness with respect to their decision to invest in employer stock, citing *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). App. 37. The district court further held that plaintiffs must plead facts sufficient to overcome this presumption at the pleading stage by plausibly alleging that ESOP fiduciaries abused their discretion by remaining invested in employer stock. *Id.* at 37-38. Relying on the well-established pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the court reasoned:

> if the plan at issue is an ESOP, as in this case, there really is no choice but to apply the *Kuper*

> presumption at the pleading stage . . . *Twombly* and *Iqbal* require the complaint to state a claim that is plausible on its face. If an ESOP plan fiduciary starts with a presumption that the decision to remain invested in plan securities was reasonable, then a claim for breach of fiduciary duty only becomes plausible if there are sufficient facts alleged to conclude that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.' *Id.* at 38.

The district court – relying on decisions from the Third, Fifth, Sixth and Ninth Circuits – held that the complaint failed to "establish any facts which would have caused a reasonable fiduciary to cease offering Fifth Third stock as an investment option and/or divest Fifth Third stock from the Plan entirely." App. 45-46. The district court reasoned: (i) the complaint failed to plausibly allege that Fifth Third's ongoing viability was in jeopardy under *Kuper* (*id.* at 45); and (ii) the allegations in the complaint merely challenged Fifth Third's business judgment, which is not actionable under ERISA (*id.* at 47).

With respect to Respondents' misrepresentation claim, the district court held that mere incorporation by reference of SEC filings into plan documents does not sufficiently state a claim for breach of fiduciary duty based on allegedly misleading statements or omissions in the underlying filings. App. 49-50. Relying on this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the district court concluded "to act as a fiduciary, the defendant must intentionally connect his statements about the financial status of the

company to the ERISA benefit plan." App. 49-50. The district court held that Respondents failed to state a claim because there were no factual allegations indicating that "the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund," and therefore the challenged statements were not made in a fiduciary capacity. *Id.*

3. The Sixth Circuit's Decision

The Sixth Circuit reversed each holding of the district court. The Sixth Circuit became the only circuit to refuse to apply the presumption of reasonableness/abuse of discretion standard at the pleading stage. The Sixth Circuit similarly stands in stark conflict with its sister circuits by holding plan fiduciaries strictly liable for the mere incorporation by reference of SEC filings into plan documents.

While acknowledging that *Kuper* adopted a presumption of reasonableness with respect to an ESOP fiduciary's decision to invest in employer stock, which is only reviewed for an abuse of discretion, the Sixth Circuit refused to apply this presumption at the pleading stage, in conflict with the Second, Third and Eleventh Circuits. App. 11-13. The Sixth Circuit initially announced its divergence from the holdings of its sister circuits in *Pfeil v. State Street Bank and Trust Co.*, 671 F.3d 585 (6th Cir. 2012), even after acknowledging that the issue was not before it in that case. The Sixth Circuit concluded *Pfeil* was controlling in this case. App. 11-13. The court's refusal to apply the *Kuper* presumption at the pleading stage has created a clear circuit split that the Sixth Circuit acknowledged:

"some circuits have reached a different conclusion." *Id.* at 12.

To reach its novel holding, the Sixth Circuit recast the presumption of reasonableness as an evidentiary presumption, requiring a fully developed evidentiary record which does not exist at the pleading stage. App. 11-12. The Sixth Circuit further stated that it never has adopted a specific test for overcoming the presumption that requires allegations that the company "faced a 'dire situation,'" or faced "'the brink of bankruptcy' or an 'impending collapse.'" *Id.* at 12. Because "*Kuper* only requires a plaintiff to prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision,'" the Sixth Circuit held that plausible allegations that an ESOP fiduciary abused its discretion by continuing to invest in employer stock are not necessary to state a breach of fiduciary duty claim under ERISA. *Id.* at 12-13.

The Sixth Circuit went further and summarily eliminated the well-established distinction between ESOPs and conventional retirement plans, holding that "*all* fiduciaries, including ESOP fiduciaries" are now subject to "identical standards of prudence and loyalty." App. 12-13 (emphasis in original). The Sixth Circuit is the only circuit to apply this prudent man standard to review an ESOP fiduciary's decision to remain invested in employer stock, despite the statutory exemptions created by Congress to protect ESOP fiduciaries from failure to diversify claims. *Id.*

The decision below created another circuit split on the issue of whether the incorporation by reference of

SEC filings into plan documents constitutes a fiduciary act under ERISA. App. 15-23. Holding in the affirmative, the Sixth Circuit's decision conflicts with precedent of this Court and the holdings of the Second, Fifth and Eleventh Circuits.

In determining that mere incorporation by reference of SEC filings is sufficient for liability, the Sixth Circuit ignored the "intentional connection" test enunciated by this Court in *Varity* that requires allegedly misleading statements about the company's financial health to be tied to statements concerning the future of plan benefits. 516 U.S. at 505. The decision below focused on the fact that a summary plan description ("SPD"), which incorporated SEC filings by reference, is an ERISA-required document and therefore "unquestionably a fiduciary communication." App. 18. The Sixth Circuit disregarded this Court's precedent and fundamental ERISA principles that require courts to look at whether the defendant was acting as a fiduciary when it made the challenged statements and blurred the distinction between corporate and ERISA communications. By so doing, the Sixth Circuit imposed strict liability on ERISA fiduciaries for the statements made by corporate officers and directors pursuant to securities laws which have no connection to the future of plan benefits.

Petitioners filed a petition for rehearing and rehearing en banc, which the Sixth Circuit denied. App. 53-54.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for the following compelling reasons:

1. In conflict with every other circuit to address the issue, the Sixth Circuit eliminated the statutory exemptions which Congress afforded to ESOP fiduciaries when it refused to apply a presumption of reasonableness at the pleading stage with respect to an ESOP fiduciary's decision to invest in employer stock and require plaintiffs to plausibly allege that the ESOP fiduciary abused its discretion in order to state an ERISA breach of fiduciary duty claim.

2. The Sixth Circuit ignored the precedent of this Court and every other circuit to address the issue when it held that statements made in SEC filings become actionable ERISA fiduciary communications when they are merely incorporated by reference into plan documents.

The Sixth Circuit's decision constitutes plain error on these important and recurring questions of federal law and should be summarily reversed or plenary review should be granted.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS HOLDING THAT AN ESOP FIDUCIARY'S DECISION TO INVEST IN EMPLOYER STOCK IS PRESUMED REASONABLE AT THE PLEADING STAGE AND ONLY REVIEWED FOR AN ABUSE OF DISCRETION.

The Sixth Circuit refused to require Respondents to overcome the presumption of reasonableness at the pleading stage with plausible allegations that ESOP fiduciaries abused their discretion by remaining invested in employer stock because the company was in a dire situation or its ongoing viability was in question. Contrary to the five circuits that have applied this abuse of discretion standard – including the three circuits applying it at the pleading stage – the Sixth Circuit eliminated the statutory exemptions afforded to ESOP fiduciaries. The court also blurred the statutory distinction between ESOPs and conventional pension plans by applying an ordinary prudent man standard to review the decision of ESOP fiduciaries to remain invested in employer stock. This decision guarantees that ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates.

A. Following *Twombly* and *Iqbal*, the Presumption of Reasonableness and Abuse of Discretion Standard Apply at the Pleading Stage.

Nearly twenty years ago, the Third Circuit first adopted a presumption of reasonableness with respect to an ESOP fiduciary's decision to invest in employer

stock, holding that a plaintiff may only overcome that presumption by establishing that the fiduciary abused its discretion by remaining invested in employer stock. *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). Several months after *Moench*, the Sixth Circuit adopted the Third Circuit's presumption and abuse of discretion holding. *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). The Second, Fifth, Ninth and Eleventh Circuits have all followed suit. *In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 253-56 (5th Cir. 2008); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1279 (11th Cir. 2012).

Following the heightened "plausibility" pleading standard adopted by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), the Second, Third and Eleventh Circuits – the only circuits to have addressed the issue – have held that the abuse of discretion standard applies at the pleading stage:

- **Second Circuit** – "Where plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss." *In re Citigroup*, 662 F.3d at 139.

- **Third Circuit** – "We . . . see no reason to allow this case to proceed to discovery when, even if the allegations are proven true, Edgar cannot establish that defendants abused their discretion." *Edgar v. Avaya*, 503 F.3d 340, 348-49 (3d Cir. 2007).

- **Eleventh Circuit** – "Unless a plaintiff pleads facts sufficient to raise a plausible inference that the fiduciary abused its discretion by following the plan's directions, the complaint fails to state a valid claim and a motion to dismiss should be granted." *Lanfear*, 679 F.3d at 1281.

Because these circuits apply an abuse of discretion standard at the pleading stage, it "is an element of a claim that the fiduciary's decision was imprudent." *Lanfear*, 679 F.3d at 1281. Each of these circuits based its holding on the conclusion that abuse of discretion is a standard of review, not an evidentiary presumption. *See In re Citigroup*, 662 F.3d at 139; *Edgar*, 503 F.3d at 349; *Lanfear*, 679 F.3d at 1281.

Despite this clear weight of authority, the Sixth Circuit refused to apply the abuse of discretion standard at the pleading stage. App. 11-13; *see also Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 593 (6th Cir. 2012). In doing so, it erroneously recast the *Kuper* presumption as an evidentiary presumption, rather than a standard of review. App. 12. The Sixth Circuit below, therefore, held that abuse of discretion is not a pleading requirement. App. 12-13.[2]

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[2] Following the Sixth Circuit's decision in *Pfeil*, State Street Bank & Trust Company filed a petition for a writ of certiorari concerning the applicability of the safe harbor provided by ERISA § 404(c), 29 U.S.C. § 1104(c), and issues of loss causation, but explicitly stated that its petition did not raise the issue of whether the presumption of reasonableness and abuse of discretion standard apply at the pleading stage. *See State Street Bank and Trust Co. v. Pfeil*, U.S. 12-256, Petition for a Writ of Certiorari, at 8 n.3.

The Sixth Circuit's decision in *Pfeil* – which it found controlling in this case – was immediately criticized. *See Lanfear*, 679 F.3d at 1281 n. 16; *In re BP p.l.c. Secs. & ERISA Litig.*, 2012 U.S. Dist. LEXIS 44801 (S.D. Tex. Mar. 30, 2012). The Eleventh Circuit criticized the Sixth Circuit, noting that the abuse of discretion "standard of review of fiduciary action is just that, a standard of review; it is not an evidentiary presumption. It applies at the motion to dismiss stage as well as thereafter." *Lanfear*, 679 F.3d at 1281 n. 16. *See also In re Citigroup*, 662 F.3d at 139 (abuse of discretion standard "is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary"); *Edgar*, 503 F.3d at 349.

The Eleventh Circuit also criticized the Sixth Circuit's holding because it affords ESOP fiduciaries less deference than that of the Second and Third Circuits. *Id.* This "less forgiving standard of judicial review could subject fiduciaries to liability if they adhered to the plan's terms and the stock price fell or if they deviated from the plan and the stock price rose. Closer judicial scrutiny would force ESOP fiduciaries to choose between the devil and the deep blue sea." *Lanfear*, 679 F.3d at 1279.

The Sixth Circuit's unjustified departure from the rule adopted by its sister circuits also was discussed in *In re BP p.l.c. Secs. & ERISA Litig.*, 2012 U.S. Dist. LEXIS 44801, *47-48. There, the court ultimately found the reasoning of the Second and Third Circuits more persuasive, holding that the abuse of discretion standard is "a standard of review" – not an evidentiary presumption – through which the court must analyze the decision of ESOP fiduciaries to remain invested in

employer stock at the pleading stage. *Id.* at *51. "If a plaintiff does not plead such persuasive and analytically rigorous facts, i.e., the essential elements of his or her claim, there is no reason for the district court to allow the claim to proceed to discovery where, even if the allegations pleaded were proven true, plaintiffs would be unable to establish that Defendants abused their discretion." *Id.* (citing *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605, 610 (2d Cir. 2011)).

No other circuit has followed *Pfeil* or the decision below, and for good reason. As the Eleventh Circuit warned – ESOP fiduciaries must now "choose between the devil and the deep blue sea." *Lanfear*, 679 F.3d at 1279. The choice for ERISA plaintiffs, however, is very clear: file the breach of fiduciary duty lawsuit in the district courts of the Sixth Circuit when an employer's stock price drops, even when there is no plausible allegation of abuse of discretion, and be guaranteed to proceed with time-consuming discovery. The Court should grant review to restore uniformity among the circuits on this important and recurring question of federal law.

B. The Decision Below Conflicts With the Decisions of Every Circuit Requiring Plaintiffs to Plausibly Allege That the Company Was in a Dire Situation or its Ongoing Viability Was in Question to State a Claim That ESOP Fiduciaries Breached Their Duties to Plan Participants by Failing to Divest the Plan of Employer Stock.

The Sixth Circuit allowed Respondents' claims to proceed based on conclusory allegations concerning market warnings, company mismanagement, and a subsequent decline in the employer's stock price. App. 12. This decision is irreconcilable with the principles articulated by all other circuits to have addressed the issue.

Following this Court's decisions in *Twombly* and *Iqbal*, five circuits consistently articulated the high barrier plaintiffs must overcome to state a plausible claim against an ESOP fiduciary for its failure to divest the plan of employer stock:

- The **Second Circuit** concluded, "we believe that only circumstances placing the employer in a **'dire situation'** that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms." *In re Citigroup*, 662 F.3d at 140 (emphasis added) (citations omitted).

- The **Third Circuit** found that corporate developments likely to have a negative effect on company earnings and its stock price do

not create a "**dire situation** which would require defendants to disobey the terms of the plans by not offering" company stock or divesting the plan of company stock. *Edgar*, 503 F.3d at 348 (emphasis added).

- The **Fifth Circuit** concluded the plaintiff could not establish its claim where there was "no indication that **[the company's] viability as a going concern was ever threatened**, nor that [the company's] stock was in danger of becoming essentially worthless." *Kirschbaum*, 526 F.3d at 255 (emphasis added).

- The **Ninth Circuit** held that to establish a non-speculative claim, "plaintiffs must therefore make allegations that 'clearly implicate [ ] the **company's viability as a going concern**'." *Quan*, 623 F.3d at 882 (citation omitted) (emphasis added).

- The **Eleventh Circuit** concluded that plaintiffs must allege the "type of **dire situation** which would require defendants to disobey the terms of the Plan by not offering" company stock or divesting the plan of company stock. *Lanfear*, 679 F.3d at 1282 (emphasis added).

These pleading requirements serve as a "'substantial shield' that protects fiduciaries from liability where 'there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock.'" *In re Citigroup*, 662 F.3d at 140

(quoting *Kirschbaum*, 526 F.3d at 256; *Quan*, 623 F.3d at 882). This allows ESOP fiduciaries to "fulfill their duties in the safe harbor that Congress seems to have intended for them" in managing ESOPs. *Quan*, 623 F.3d at 882.

ESOP fiduciaries are not required to ignore plan directives and entirely divest the plan of employer stock "just because they were aware that the stock price would likely fall." *Lanfear*, 679 F.3d at 1282; *Kirschbaum*, 526 F.3d at 256 ("[o]ne cannot say that whenever fiduciaries are aware of circumstances that may impair the value of company stock, they have a fiduciary duty to depart from the ESOP or EIAP plan provisions."). This is because "a fiduciary's decision not to divest, when faced with 'mere stock fluctuations, even those that trend downward significantly,' does not give rise to the inference that the fiduciary did not properly investigate the merits of continued investment in employer stock." *Quan*, 623 F.3d at 883 (citation omitted).

The Sixth Circuit rejected the sound reasoning of these decisions, opting for an ill-defined standard of "equality" and flexibility to be applied to *all* fiduciaries, including ESOP fiduciaries, even in the absence of plausible allegations that a company faced a dire situation or its ongoing viability was threatened. App. 12-13. The Sixth Circuit's endorsement of this fuzzy standard highlights the conflict with the other circuits and the deficiency of its logic.

The Sixth Circuit concluded that bare allegations of warnings by industry watchdogs, articles about the subprime lending market, and a "lack of leadership,"

coupled with a decline in stock price, are sufficient to state a claim that ESOP fiduciaries should have completely divested the plan of employer stock. App. 13-15.

The district court properly dismissed these claims as merely challenging the "wisdom of Fifth Third's business judgment," which is not an actionable theory of recovery under ERISA. App. 47.[3] It held that the complaint failed to plausibly allege that Fifth Third was in a "dire financial predicament," and "the fact that the company remained viable despite a substantial drop in the stock price is a strong indicator that no breach of fiduciary duty occurred by remaining invested in employer securities." *Id.* at 44-45.

The district court's decision is in line with the decisions of every other circuit to address the issue. The Sixth Circuit, however, went out of its way to create another unnecessary conflict among the circuits. Summary reversal or plenary review is warranted to eliminate this conflict the Sixth Circuit created.

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[3] Other courts have reached the same conclusion. *See Pugh v. Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2007) (dismissing breach of fiduciary duty claims because allegations of corporate mismanagement are insufficient to trigger a duty to investigate prudence of investing in employer stock); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 849-50 (S.D. Ohio 2009) (dismissing breach of fiduciary duty claims challenging company's business judgment based on warnings concerning subprime lending as being insufficient to trigger a duty to investigate because ERISA does not impose a duty to "continuously audit operational affairs").

C. The Sixth Circuit's Application of an Ordinary Prudent Man Standard to Review an ESOP Fiduciary's Decision to Remain Invested in Employer Stock Eliminates the Statutory Exemptions Afforded to ESOP Fiduciaries.

The Sixth Circuit clearly erred when it applied an ordinary prudent man standard of review to an ESOP fiduciary's decision to remain invested in employer stock. The court of appeals went far beyond its previous decisions, and further than Congress or any circuit has ever gone, when it declared that "*all* fiduciaries, including ESOP fiduciaries," are now subject to "identical standards of prudence and loyalty," despite the statutory exemptions that Congress carved out for ESOP fiduciaries when it enacted ERISA. App. 12-13 (emphasis in original).

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), sets forth general fiduciary duties owed to plan participants, including the duty to act in the best interest of plan participants, the duty to act as a prudent person, the duty to act for the exclusive purpose of providing benefits to plan participants, the duty to act in accordance with plan documents consistent with ERISA, and the duty to diversify investment of plan assets. *Kuper*, 66 F.3d at 1458. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), generally prohibits fiduciaries from self-dealing.

In enacting ERISA, Congress created ESOPs to encourage employee ownership of employer stock. *Kuper*, 66 F.3d at 1458; H.R. Rep 93-1280, at 313 (1973), *reprinted* in 1974 U.S.C.C.A.N. 5038, 5093

(ESOPs are designed to "build equity ownership of shares of the employer corporation for its employees"). Congress explicitly exempted ESOP fiduciaries from the duty of diversification, the duty of prudence to the extent it requires diversification, and the prohibition against self-dealing. *See* ERISA §404(a)(2), 29 U.S.C. § 1104(a)(2); ERISA § 408(e)(3), 29 U.S.C. § 1108(e)(3); *Kuper*, 66 F.3d at 1458; *Moench*, 62 F.3d at 568. "ESOP fiduciaries cannot be held liable for failing to diversify investments, regardless of whether diversification would be prudent under the terms of an ordinary non-ESOP pension plan." *Kuper*, 66 F.3d at 1458; *see also Moench*, 62 F.3d at 568 ("ESOP fiduciaries cannot be taken to task for failing to diversify investments, regardless of how prudent diversification would be under the terms of an ordinary non-ESOP pension plan.").

The exemptions for ESOP fiduciaries are necessary because – unlike ordinary pension plans – ESOPs are "designed to invest primarily in qualifying employer securities." *Kuper*, 66 F.3d at 1457 (quoting ERISA § 407(d)(6)(A), 29 U.S.C. § 1107(d)(6)(A)). ESOPs are not designed to guarantee retirement benefits because concentrated investment in employer stock necessarily carries more risk than investment in a diversified portfolio of an ordinary non-ESOP pension plan. *Id.* at 1457. Congress repeatedly has warned against judicial action that would thwart investment in employer stock or "treat employee stock ownership plans as conventional retirement plans." S. Rep. No. 93-127, at 32 (1973), *reprinted* in 1974 U.S.C.C.A.N. 4838, 4869; 26 U.S.C. § 4975 (notes); *see also Kuper*, 66 F.3d at 1458; *Moench*, 62 F.3d at 569 (citing Tax Reform Act of 1975, Pub. L. No. 94-455 § 803(h), 90 Stat. 1582, 1590)

("Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans . . . and which otherwise block the establishment and success of these plans.").

Mindful of this Congressional intent, the federal courts adopted the abuse of discretion standard for ESOP fiduciaries because applying an ordinary prudent man standard to failure to diversify claims "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Kuper*, 66 F.3d at 1458-59. Any less deferential standard "would risk transforming ESOPs into ordinary pension plans, thus frustrating Congress's desire to encourage employee ownership and contravening the intent of the parties." *Id.* at 1459.

While the Sixth Circuit correctly noted that the *general* standards of prudence and loyalty apply to ESOP fiduciaries, it impermissibly disregarded the *ESOP-specific* exemptions included in ERISA when it applied an ordinary prudent man standard:

> And this unembellished standard makes sense – not just because it closely tracks the statutory language of § 404(a)(1)(B) – but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries.

App. 9-10, 12-13 (emphasis in original). This standard cannot be reconciled with the exemptions Congress expressly enacted to protect ESOP fiduciaries and the

decisions of its sister circuits that apply the abuse of discretion standard to identical conduct. *Moench*, 62 F.3d at 571; *In re Citigroup,* 662 F.3d at 138; *Kirschbaum*, 526 F.3d at 253-56; *Quan,* 623 F.3d at 881; *Lanfear*, 679 F.3d at 1279.

Other circuits uniformly recognize that, by definition, the statutory exemptions afforded to *ESOP* fiduciaries demonstrate that Congress did not impose *identical* standards on *all* fiduciaries. *See Eaves v. Penn*, 587 F.3d 453, 460 (10th Cir. 1978) ("[T]he legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments."); *Moench*, 62 F.3d at 568-69 ("except for a few select provisions . . . ESOP fiduciaries must act in accordance with the duties of loyalty and care."). The Court should summarily reverse the decision below, or grant plenary review, to eliminate the conflict among the circuits and restore the exemptions Congress enacted to protect ESOP fiduciaries.

* * *

Under the new Sixth Circuit standard, ESOP fiduciaries now face liability for failing to divest plans of all employer stock every time the stock price fluctuates temporarily. Plan participants will expect ESOP fiduciaries to become "virtual guarantors of the financial success of the ESOP plan," *Moench*, 62 F.3d at 570, and adopt risky strategies to maximize returns on plan investments. ESOP fiduciaries must now strive to meet this unattainable standard of predicting

the future of company stock performance and financial markets worldwide "so as to not breach their fiduciary duties under ERISA." *In re Huntington Bancshares*, 620 F. Supp. 2d at 853; *Kirschbaum*, 526 F.3d at 256. This is not what Congress intended.[4]

II. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT AND DECISIONS OF OTHER CIRCUITS HOLDING THAT STATEMENTS MADE IN SEC FILINGS DO NOT BECOME ACTIONABLE ERISA FIDUCIARY COMMUNICATIONS MERELY THROUGH INCORPORATION BY REFERENCE INTO PLAN DOCUMENTS.

The Sixth Circuit held that because a SPD is an ERISA-mandated fiduciary communication, the mere incorporation of SEC filings by reference into a SPD is a fiduciary activity. The Sixth Circuit clearly erred by: (i) eliminating the first element of a breach of fiduciary duty claim based on misrepresentations, i.e., the requirement that the defendant actually make the challenged misrepresentation, while acting in an

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[4] *See Lanfear*, 679 F.3d at 1282 (prudent investing does not involve "market timing" and "there is nothing in this Plan to indicate that those who created it intended for fiduciaries to disregard their instructions based on short term investments and fluctuations in the market."); *Quan*, 623 F.3d at 885 (the "'long-term horizon of retirement investing' requires protecting fiduciaries from pressure to divest when the company's stock drops"); *Kirschbaum*, 526 F.3d at 254 (prudence focuses on "'how the fiduciary acted' not 'whether his investments succeeded or failed,'" and relevant to this inquiry are the "'long-term horizon of retirement investing,' as well as the favored status Congress has granted to employee stock investments in their own companies.").

ERISA fiduciary capacity; (ii) ignoring this Court's requirement of an intentional connection between statements made about a company's financial condition and the future of plan benefits; and (iii) creating a conflict with the decisions of the Second, Fifth and Eleventh Circuits. This decision imposes strict liability on ERISA fiduciaries for the statements of corporate officers and directors made pursuant to securities laws.

A. The Sixth Circuit's Ruling Conflicts With Long-Standing Precedent of This Court and Basic Tenets of ERISA Law.

One of the most fundamental principles of ERISA is that a fiduciary may wear two hats – employer and ERISA fiduciary – but that a fiduciary is not liable under ERISA for actions taken in a non-ERISA capacity. *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). The threshold question in every case alleging a breach of an ERISA fiduciary duty is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Id.* at 226. Where a claim for breach of fiduciary duty is based on alleged misrepresentations, a plaintiff must plausibly allege: "(1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) that the plaintiff relied on those misrepresentations to their detriment." *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002).

The Sixth Circuit became the first circuit to hold that plan fiduciaries may be held liable under ERISA

for allegedly misleading statements made by corporate officers in SEC filings, completely eliminating the fiduciary capacity element of a misrepresentation claim. App. 21-22. This Court, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), held that to be actionable under ERISA, allegedly misleading statements made about the company's financial health must be **"intentionally connected"** to statements about the future of plan benefits so that "its intended communication about the security of benefits was rendered materially misleading." *Id.* at 505 (emphasis added).

The decision below is irreconcilable with the *Varity* rule and the fundamental ERISA principles on which it is premised. The Sixth Circuit held that simply because a SPD is an ERISA-required document, it is "unquestionably a fiduciary communication," so merely incorporating SEC filings by reference subjects plan fiduciaries to liability under ERISA. App. 18, 22-23. The Sixth Circuit reached this conclusion despite the fact that none of the alleged misstatements in the SEC filings were made by an ERISA fiduciary or connected to fiduciary statements about the future of plan benefits. The Sixth Circuit's holding blurs the distinction between corporate and ERISA communications, completely ignores the context in which the challenged statements are made, and imposes strict liability on ERISA fiduciaries for the statements of corporate officers and directors made pursuant to securities laws.

Pegram dictates that whether a person is acting as a fiduciary requires courts to analyze the "action subject to complaint" – here, the alleged misleading statements in SEC filings. 530 U.S. 226. These

purported misleading statements were made by corporate officers and directors acting in a corporate capacity by preparing, signing and disseminating SEC filings required by law. No ERISA fiduciary made these alleged misleading statements or took action that is "subject to complaint." Corporate officers or directors may be liable under federal securities laws for any misstatements contained in SEC filings. They are not additionally liable under ERISA for the same alleged conduct.

The mere incorporation by reference of allegedly misleading SEC filings into an ERISA-mandated document does not change this result. As *Varity* made clear, where corporate statements are communicated to plan participants there must be an "intentional connection" between the corporate statements and statements about the future security of plan benefits. 516 U.S. at 505. The Sixth Circuit tried to distinguish *Varity* on the flawed ground that the employer statements in that case were made "outside the course of plan administration," and therefore this Court's holding is not applicable. App. 20. The communications at issue in *Varity*, however, occurred during a special meeting that the employer held specifically for plan participants. 516 U.S. at 493-494. Seeking to persuade the participants to accept changes to their benefit plans, the employer made representations about the company's future business outlook and financial viability, stating that the participants' benefits would remain secure going forward. *Id.* These communications were aimed only at plan participants and directly pertained to their plan benefits. *Id.* The Sixth Circuit's attempt to distinguish

Varity on the basis that it did not involve plan administration is, therefore, irrelevant.

If the Sixth Circuit's holding is permitted to stand, the mere incorporation by reference of allegedly misleading SEC filings into plan documents will impose strict liability under ERISA, while explicit misrepresentations made directly to plan participants at a special meeting concerning the future of plan benefits are subject to the less stringent "intentional connection" test. Clearly, this is not and cannot be the law.

The district court in this case properly relied on *Varity* in concluding that all of the alleged misleading statements identified in the operative complaint were made by corporate officers in SEC filings and were not connected to fiduciary statements about the future of plan benefits. App. 49-50. Accordingly, the district court held that Respondents could not state a plausible claim that Defendants breached their ERISA fiduciary duties because the communications were not made in an ERISA fiduciary capacity. *Id.*

B. The Decision Below Conflicts with Decisions of Other Circuits.

If the Court does not summarily reverse, it should grant plenary review to resolve the circuit conflict created by the decision below. Other circuits have correctly held that the incorporation of SEC filings by reference into plan documents does not constitute ERISA fiduciary activity.

The first decision on this issue was *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008), where the Fifth Circuit relied on this Court's decision in *Varity*, 516 U.S. at 505, to hold that when the defendant incorporated SEC filings into its plan prospectus and distributed that prospectus to plan participants, it was merely "discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary." *Kirschbaum*, 526 F.3d at 257. The *Kirschbaum* court reasoned that the defendant was obligated through securities laws to incorporate the SEC filings into its plan prospectus, and to distribute the prospectus to plan participants, thereby placing the defendants in their corporate, rather than fiduciary, capacities. *Id.* (*citing* 17 C.F.R. § 230.428(a)(1), (b)(1)). This reasoning is sound because those "who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently do not violate ERISA if the filings contain misrepresentations." *Id.* at 257.

The Second Circuit, in *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011), specifically addressed and rejected the argument that the incorporation of SEC filings into an ERISA-mandated SPD constitutes a fiduciary act sufficient to state a claim for ERISA liability. *Id.* at 610-611. Relying on *Pegram* and *Kirschbaum*, the court held that:

> The only specific false or misleading statements identified by defendants are those contained in SEC filings that were later incorporated into the Plans' Summary Plan Descriptions ("SPDs"). ERISA, however, only holds fiduciaries liable to the extent that they were 'acting as a fiduciary

> . . . when taking the action subject to the complaint.' Here, defendants who signed or prepared the SEC filings were acting in a corporate, rather than a fiduciary, capacity when they did so. Therefore . . . these defendants may not be held liable under ERISA for misstatements contained in the SEC filings. (citations omitted). *Id.*

The Second Circuit further concluded that plaintiffs' conclusory allegation that defendants "knew or should have known" that the SEC statements issued by the corporation were false or misleading at the time they were incorporated into the plans' SPDs was not sufficient to state an ERISA breach of fiduciary duty claim. *Id.* at 611.

The Eleventh Circuit recently joined the Second and Fifth Circuits, holding that when the defendants created and distributed a plan prospectus containing alleged misrepresentations from SEC filings incorporated by reference, "they were acting in their corporate capacity and not in their capacity as ERISA fiduciaries." *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1283-84 (11th Cir. 2012). "Because they were not acting as fiduciaries when they took those actions, any misrepresentations in those documents did not violate ERISA." *Id.* at 1284.

The decision below directly conflicts with these decisions on multiple grounds. First, the Sixth Circuit completely ignored the holding of the Second Circuit in *Gearren* and went so far as to mistakenly contend that "[n]o circuit court has answered the question of whether the express incorporation of SEC filings into

an ERISA-mandated SPD is a fiduciary communication." App. 20. Because the *Gearren* decision clearly held that incorporation of SEC filings into an ERISA-mandated SPD was not a fiduciary act, this premise of the Sixth Circuit's holding is wrong and creates a clear circuit split on this issue.

Second, as to *Kirschbaum* and *Lanfear*, the Sixth Circuit summarily dismissed these cases as inapplicable. App. 20-21. The decision below first distinguished *Kirschbaum* on the ground that the plan prospectus that incorporated SEC filings by reference in that case was not disseminated to plan participants. *Id.* at 20. This is flatly wrong. The Fifth Circuit, on multiple occasions, made clear that the plan prospectus at issue in *Kirschbaum* was distributed to plan participants and that defendants had an obligation to do so. 526 F.3d at 257. This second basis for the Sixth Circuit's holding is therefore also in error.

Third, the decision below reasons that both *Kirschbaum* and *Lanfear* involved plan prospectuses, not ERISA-mandated SPDs, and thus only incorporation of SEC filings into the latter is a fiduciary act. App. 20-21. This does nothing more than elevate form over substance. Where the same SEC filings are incorporated by reference into documents that both are disseminated to plan participants, it makes no difference whether securities or ERISA law mandated the distribution. Neither document "intentionally connects" the SEC statements to statements regarding the security of plan benefits and therefore neither constitutes a fiduciary act subject to ERISA liability.

Finally, the Sixth Circuit concluded that this case is consistent with what *Kirschbaum* specifically chose not to address – a circumstance where the plan prospectus also was used as the SPD. App. 21. Once again, this is plain error. As the exhibits to the operative complaint in this case make clear, Petitioners' plan prospectus and SPD were two separate and distinct documents – a full copy of the SPD was simply incorporated into the prospectus for dissemination purposes. The two documents, however, were not the same. The Sixth Circuit's holding is thus seriously flawed on multiple grounds.

* * *

The effect of the Sixth Circuit's opinion is that forwarding SEC filings to plan participants creates no fiduciary liability, but incorporating SEC filings by reference into a SPD – without changing, amending, or modifying their substance – is a fiduciary act. This makes no sense. The Sixth Circuit's opinion will require plan fiduciaries to investigate the truth of every single statement made in SEC filings that is incorporated by reference into plan documents, despite the fact that these statements are already independently verified and certified by the company, its officers and professional advisors. Plan fiduciaries do not have the time, resources, or access to information to make such an independent and redundant verification.

The legislative history of ERISA and this Court's precedent seek to protect plan fiduciaries, and differentiate between communications relating solely to the future of plan benefits and communications

relating to a company's financial condition that are authored and verified by others not acting in an ERISA capacity. The Sixth Circuit's opinion destroys this distinction and conflicts with the opinions of its sister circuits on this issue. The Court should summarily reverse the Sixth Circuit or grant plenary review.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the decision below or, alternatively, accept the case for plenary review.

Respectfully submitted,

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING &
KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed September 5, 2012]

JOHN DUDENHOEFER, on behalf of himself and all others similarly situated; ALIREZA PARTOVIPANAH, *Plaintiffs-Appellants*,

v.

FIFTH THIRD BANCORP; KEVIN T. KABAT; PAUL L. REYNOLDS; THE PENSION AND PROFIT SHARING COMMITTEE; NANCY PHILLIPS; GREG CARMICHAEL; ROBERT SULLIVAN; MARY TUUK; JOHN DOES 1–20, *Defendants-Appellees*.

App. 2

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:08-cv-538—Sandra S. Beckwith, District Judge.

Argued: June 7, 2012

Decided and Filed: September 5, 2012

Before: COOK and STRANCH, Circuit Judges;
LAWSON, District Judge.*

COUNSEL

ARGUED: Peter H. LeVan, Jr., KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania, for Appellants. Joseph M. Callow, Jr., KEATING, MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Appellees. Melissa Moore, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Edward W. Ciolko, Mark K. Gyandoh, KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania, Thomas J. McKenna, GAINEY & McKENNA, New York, New York, for Appellants. Joseph M. Callow, Jr., James E. Burke, Danielle M. D'Addesa, David T. Bules, KEATING, MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Appellees. Melissa Moore, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., Jay E.

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* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

Sushelsky, AARP FOUNDATION, Washington, D.C., for Amici Curiae.

OPINION

JANE B. STRANCH, Circuit Judge. Plaintiffs John Dudenhoefer and Alireza Partovipanah, participants in and contributors to their employer's retirement plan, filed suit against Fifth Third and several individual Defendants on behalf of themselves and a class of similarly situated individuals alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Plaintiffs alleged that plan fiduciaries continued to invest in and hold Fifth Third Stock despite its precipitous decline in value in breach of their fiduciary duties including their duty to prudently and loyally manage the plan's investment in company securities. The district court found Plaintiffs failed to state claims upon which relief could be granted and granted Defendants' Motion to Dismiss the Amended Complaint. This appeal followed. For the following reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings.

I. BACKGROUND

A. Factual History

Because this appeal arises from a decision at the motion to dismiss stage, we draw the facts from the allegations of the Amended Complaint. Plaintiffs John Dudenhoefer and Alireza Partovipanah, former employees of Fifth Third Bank, are plan participants in

the Fifth Third Bancorp Master Profit Sharing Plan ("the Plan") and invested in Fifth Third common stock through the Plan during the class period. The Plan is a defined contribution retirement plan for employees sponsored by Fifth Third, which serves as trustee. Participants make voluntary contributions to the Plan from their salaries and direct the Plan to purchase investments for their individual account from options preselected by the Defendants. During the class period, these options included Fifth Third Stock, two collective funds, or seventeen mutual funds.

Once employees are eligible to participate in the Plan, Fifth Third matches 100% of the first 4% of a participant's compensation contributed as part of the employee's compensation package. Those matching contributions are initially invested in the Fifth Third Stock Fund but may be moved subsequently to the other investment options. The Plan is not invested solely in Fifth Third Stock, nor is it required to be: the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates. The Plan fiduciaries chose to incorporate by reference Fifth Third's SEC filings into the Summary Plan Description (SPD), an ERISA required communication to Plan participants.

During the class period, a significant amount of the Plan's assets were invested in Fifth Third Stock. Plaintiffs allege that, during this period, Fifth Third switched from being a conservative lender to a subprime lender, its loan portfolio became increasingly

at risk due to defaults, and it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures. The price of Fifth Third Stock declined 74% from the beginning of the class period, July 19, 2007 through September 18, 2009, causing the Plan to lose tens of millions of dollars. The Amended Complaint further alleges that: Defendants were aware of the risks presented by its investment in the subprime lending market, citing specific public sources; and business and accounting mismanagement related to these risks, coupled with incomplete and inaccurate statements by Fifth Third executives, caused the price of Fifth Third Stock to be artificially inflated before plummeting. It is alleged that "[a] prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated."

B. Procedural History

On September 21, 2008, Plaintiffs filed an Amended Complaint alleging ERISA violations against Fifth Third; Kevin T. Kabat, Fifth Third's President and Chief Executive Officer during the class period; and members of Fifth Third's Pension, Profit Sharing, and Medical Plan Committee (the "Committee"). Plaintiffs allege each Defendant acted as a fiduciary with respect to the Plan during the class period. The Amended Complaint contains four counts. Count I alleges that: (1) all Defendants breached their fiduciary duties under ERISA by maintaining significant investment in Fifth Third Stock and continuing to offer it as an authorized investment option at a time that they knew or should have known it was imprudent to do so; and (2) the Defendants breached their fiduciary duties by

failing to provide Plan participants with accurate and complete information about Fifth Third and the risks of investment in Fifth Third Stock. Count II alleges that Fifth Third and President/CEO Kabat breached their fiduciary duties under ERISA by failing to properly monitor the performance of their fiduciary appointees. Count III alleges that all Defendants failed to avoid or ameliorate inherent conflicts of interest relating to their management of the Plan. Finally, Count IV alleges that all Defendants are liable for breaches of their co-fiduciaries.

On October 5, 2008, Defendants filed a Motion to Dismiss the Amended Complaint. On November 24, the district court granted the motion, finding that the Amended Complaint failed to state a plausible claim for relief. Specifically, the district court found that the Plan was an employee stock ownership fund ("ESOP") under ERISA and, thus, Defendants benefitted from a presumption that their decision to remain invested in employer securities was reasonable. Applying this presumption at the motion to dismiss stage, the district court found that Count I of the Amended Complaint failed to allege facts to overcome this presumption of reasonableness. The district court also found that Count I of the Amended Complaint failed to the extent it relied on SEC filings incorporated into Plan documents because the court concluded the Defendants did not speak in a fiduciary capacity when those alleged misstatements and omissions were made. Finally, the district court dismissed the remaining Counts based entirely on their dependency on Count I. The district court dismissed the Amended Complaint in its entirety and denied the Plaintiffs' request for leave to amend. Plaintiffs timely appealed.

II. ANALYSIS

A. Standard of Review

This court reviews the district court's order granting a Rule 12(b)(6) motion to dismiss de novo. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008). In assessing a complaint for failure to state a claim, we must construe the complaint in the light most favorable to the plaintiff, accept all well pled factual allegations as true, and determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation and citation omitted).

B. Count I: Violations of ERISA Fiduciary Duties

1. Fiduciary Duties under ERISA for ESOPs

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA safeguards the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). Section 404(a)(1) establishes the fiduciary duties of trustees administering plans governed by ERISA:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a)(1). These fiduciary duties have been broken down into three components. *See Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 840 (6th Cir. 2003). First, a fiduciary owes a duty of loyalty "pursuant to which all decisions regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries." *Id.* (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995) (internal quotations marks omitted)). Second, ERISA imposes "an unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to [the] plan participants and beneficiaries." *Id.* (same). Third, ERISA fiduciaries must act for the exclusive purpose of providing benefits to plan beneficiaries. *Id.* "The duties charged to an ERISA fiduciary are the highest known to the law." *Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 591 (6th Cir. 2012) (citation and alteration omitted). Section 409(a) of ERISA holds a fiduciary who breaches any of these duties personally liable for any losses to the plan that result from its breach of duty. 29 U.S.C. § 1109(a).

Congress made certain exceptions to these fiduciary duties for investments by employee stock ownership plans ("ESOPs"), defined under 29 U.S.C. § 1107(d)(6). *See Kuper*, 66 F.3d at 1458. Specifically, Congress eliminated the duty to diversify and the duty of prudence *to the extent that it requires diversification* with respect to investment in employer stock. 29 U.S.C. § 1104(a)(2). "[A]s a general rule, ESOP fiduciaries cannot be held liable for failing to diversify investments, regardless of whether diversification would be prudent under the terms of an ordinary non-ESOP pension plan." *Kuper*, 66 F.3d at 1458.

However, these specific statutory exemptions do not relieve ESOP fiduciaries from their remaining fiduciary duties. As we explained in *Kuper*, the statutory exemptions for ESOPs

> do[] not relieve a fiduciary . . . from the general fiduciary responsibility provisions of [§ 1104] which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion . . . nor does it affect the requirement . . . that a plan must be operated for the exclusive benefit of employees and their beneficiaries.

Id. (citations omitted) (alterations and omissions in original); *Eaves v. Penn*, 587 F.2d 453, 460 (10th Cir. 1978) ("[T]he legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments.").

These competing concerns—administering ESOP investments consistent with the provisions of both a specific employee benefit plan and the comprehensive fiduciary scheme of ERISA—are "particularly evident when an employee claims that a fiduciary breached his ERISA duties by failing to diversify an ESOP." *Kuper*, 66 F.3d at 1458. In recognition of this conflict, we have adopted an abuse of discretion standard of review for an ESOP fiduciary's decision to invest in employer securities. *Id.* at 1459. "A fiduciary's decision to remain invested in employer securities is presumed to be

reasonable, the so-called *Kuper* or *Moench* presumption." *Pfeil*, 671 F.3d at 591 (citing *Kuper*, 66 F.3d at 1459). "A plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459. Our precedent thus establishes the standard that we find strikes the proper balance between the limited exemptions for ESOPs and fulfillment of the remedial purposes of ERISA.

2. Continued Offering of and Failure to Divest the Plan of Fifth Third Stock

The Amended Complaint alleges in Count I that all Defendants breached their ERISA fiduciary duties by continuing to offer and failing to divest the Plan of Fifth Third Stock and by failing to provide complete and accurate information about Fifth Third Stock. These allegations underlie all Counts of the Amended Complaint and we turn now to application of the legal standards to the allegations.

a. Application of the *Kuper* presumption

The district court determined that *Kuper*'s presumption of reasonableness applies at the motion to dismiss stage and was not overcome here. In so holding, it recognized that at the time of its decision, we had not resolved the issue and our district courts were split. This is no longer the case.

In February 2012, we issued our decision in *Pfeil* holding that the *Kuper* presumption "is not an additional pleading requirement and thus does not

apply at the motion to dismiss stage." 671 F.3d at 592. We based our conclusion on "the plain language of *Kuper* itself where we explained that an ESOP plaintiff could 'rebut this presumption of reasonableness by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" *Id.* at 592-93 (emphasis added in *Pfeil*) (quoting *Kuper*, 66 F.3d at 1459). We noted that *Kuper* applied the presumption at summary judgment to a fully developed evidentiary record and reasoned that it would be inconsistent to apply the *Kuper* presumption—which concerns questions of fact—at the pleading stage where the court must accept the well pled factual allegations of a complaint as true. *Id.* at 593.

Pfeil recognized that some circuits have reached a different conclusion and apply the presumption of reasonableness at the pleading stage. We specifically distinguished several cases relied on by the district court in this case noting that, "[w]e find these decisions distinguishable because these circuits have adopted more narrowly-defined tests for rebutting the presumption than the test this Court announced in *Kuper*." *Id.* at 594-95. Unlike these other circuits, we emphasized that the Sixth Circuit has "not adopted a specific rebuttal standard that requires proof that the company faced a 'dire situation,' something short of 'the brink of bankruptcy' or an 'impending collapse.'" *Id.* at 595. When properly applied to a fully developed evidentiary record, *Kuper* only requires a plaintiff to prove that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459. And this unembellished standard makes sense—not just because

it closely tracks the statutory language of § 404(a)(1)(B)—but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries. Due to this equality of standard, if a "prudent man acting in a like capacity and familiar with such matters" would not have undertaken that conduct at issue, then an ESOP or any other fiduciary may not do so regardless of whether a dire situation, pending bankruptcy, or impending collapse exists. We are not free to limit the standard set by the statute by imposing conditions not present in the statutory language.

Following the teaching of *Pfeil*, we do not apply the *Kuper* presumption of reasonableness to test the sufficiency of Plaintiffs' Amended Complaint. We apply the normal rules of notice pleading under Federal Rule of Civil Procedure 8. Thus, the proper question at the Rule 12(b)(6) stage in this case is whether the Amended Complaint pleads "facts to plausibly allege that a fiduciary has breached its duty to the plan" and a causal connection between that breach and the harm suffered by the plan—"that an adequate investigation would have revealed to a reasonable fiduciary that the investment [in Fifth Third Stock] was improvident." *Pfeil*, 671 F.3d at 596.

b. Sufficiency of Plaintiffs' Allegations

In the Amended Complaint, Plaintiffs allege that by the class period starting date of July 19, 2007, Defendants had knowledge of the 2007 warnings by industry watchdogs of subprime lending practices, the rise of foreclosures and delinquency rates in real estate loans, several published articles warning of the risks of

loosening standards in order to invest in the subprime lending market, and the closure of several mortgage companies due to their investment in the subprime mortgage industry. The Amended Complaint specifically enumerates and describes these warnings and public information of which the Defendants were aware. Plaintiffs allege this knowledge should have led Defendants to investigate whether Fifth Third Stock was still a prudent investment given its own exposure to the subprime lending. In addition to overexposure to subprime lending, the Amended Complaint also alleges Fifth Third Stock was an imprudent investment option because of company mismanagement and lack of sound leadership. Plaintiffs allege that Defendants knew or should have known of the existence of these problems because of their high-ranking positions within the company. The Amended Complaint alleges Fifth Third's participation in the U.S. Government's Troubled Asset Relief Program ("TARP") is further evidence that the company was in a weakened financial condition and an imprudent investment.[1]

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[1] In *Pfeil*, we gave examples of a court's temptation "to consider facts and evidence that have not been tested in formal discovery" when applying the *Kuper* presumption to a motion to dismiss. *Pfeil*, 671 F.3d at 593-94. For example, evidence presented by State Street, the defendant in *Pfeil*, in its motion to dismiss allegedly showed the government was expected to intervene on behalf of the company, which State Street argued showed that it was not unreasonable for the plans to continue to hold company stock during the class period. *Id.* We noted that "[t]he possibility of federal intervention and its effect on the reasonableness of holding company stock, however, present questions of fact inappropriate for resolution on a motion to dismiss." *Id.* Therefore, the district court erred to the extent it weighed Plaintiffs' alleged evidence of

As *Pfeil* explained, Plaintiffs need only allege a fiduciary breach and a causal connection to losses suffered by the Plan. They do so here. Plaintiffs allege that Fifth Third engaged in lending practices that were equivalent to participation in the subprime lending market, that Defendants were aware of the risks of such investments by the start of the class period, and that such risks made Fifth Third Stock an imprudent investment. Plaintiffs allege the price of Fifth Third Stock dropped 74% during the class period. The Amended Complaint also expressly alleges that "[a]n adequate (or even cursory) investigation would have revealed to a reasonable fiduciary that investment by the Plan in Fifth Third Stock was clearly imprudent. A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have made different investment decisions."

Based on the foregoing, the Amended Complaint plausibly alleges a claim of breach of fiduciary duty and the requisite causal connection under Count I regarding Defendant's failure to divest the Plan of Fifth Third Stock and remove that stock as an investment option. *See Pfeil*, 671 F.3d at 596.

3. Failure to Provide Complete and Accurate Information About Fifth Third Stock

"[A] claim based on the purported material misrepresentations of fiduciaries is a classic

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Fifth Third's participation in the TARP program and its effect on the reasonableness of holding Fifth Third Stock.

breach-of-fiduciary-duty claim under ERISA." *Pfahler v. Nat'l Latex Prods. Co.*, 517 F.3d 816, 826 (6th Cir. 2007). "As one would expect, lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1)." *Gregg*, 343 F.3d at 843 (citation, alteration, and internal quotation marks omitted). A fiduciary also may not materially mislead beneficiaries. *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996). We have explained that "a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled." *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999) (citation omitted). ERISA fiduciary duty provisions incorporate the common law of trusts, and the "duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Id.* at 548 (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)). Significantly, "a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally." *Id.* at 547.

The threshold question in all cases charging breach of ERISA fiduciary duty is whether the defendant was "acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). A defendant's fiduciary status is also an element of a claim of misrepresentation. To establish a claim for breach of fiduciary duty based on alleged

misrepresentations, a plaintiff must show that: (1) defendant was acting in a fiduciary capacity when it made the challenged statements; (2) the statements constituted material misrepresentations; and (3) plaintiff relied on them to his/her detriment. *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002). "Whether the communications constituted misrepresentations and whether they were material . . . are questions of fact that are properly left for trial." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443 (3d Cir. 1996); *see James*, 305 F.3d at 455 ("[W]ith respect to the situation presented when an employer on its own initiative disseminates false and misleading information about a benefit plan, the position of the Sixth Circuit is aligned with that of the Third Circuit in *Unisys*.").

The district court held that Plaintiffs' disclosure claim in Count I failed because Defendants' alleged misstatements and omissions were not made in a fiduciary capacity when Defendants expressly incorporated Fifth Third's SEC filings into Plan documents. The court's conclusion is broader than its reasoning, which focused on the filing of SEC documents *with the SEC*, not on the decision of Defendants to *incorporate those filings into the Plan documents*. Plaintiffs concede that the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA. *See In re World Com, Inc.*, 263 F. Supp. 2d 745, 766 (S.D.N.Y. 2003). The issue here is Plaintiffs' allegation that Defendants violated their fiduciary duties when they chose to incorporate SEC filings into ERISA Plan documents.

The Defendants expressly incorporated by reference specifically named SEC filings into the Plan's summary plan description ("SPD"). An SPD, a document ERISA requires to be sent to plan participants to provide specified information about the plan, is unquestionably a fiduciary communication. *See* 29 U.S.C. § 1022. Defendants chose to provide Plan participants with selected information—alleged to include misrepresentations about Fifth Third and its Stock—by incorporating only specifically enumerated SEC filings and specific future filings into the SPD:

> The SEC allows us to "incorporate by reference" into this booklet the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this booklet, and information that we subsequently file with the SEC will automatically update and supersede information in this booklet and in our other filings with the SEC. In other words, in case of a conflict or inconsistency between information contained in this booklet and information incorporated by reference into this booklet, you should rely on the information that was filed later.

Am. Compl., Ex. A, SPD of Fifth Third Bancorp at 44.

The Defendants correctly make no broad challenge to their status as fiduciaries with respect to the preparation of Plan documents. The Amended Complaint alleges Fifth Third was the trustee of the Plan and exercised responsibility through the

Committee for communicating with Plan participants and, in this fiduciary capacity, disseminated the Plan documents, including the Plan SPD to participants. The Amended Complaint also plausibly alleges that Kabat, President and CEO of Fifth Third, is a de facto fiduciary in light of his authority to augment the Plan Committee's powers and responsibilities, authority to appoint Committee members, and authority to resolve issues left unresolved by the Committee. *See Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir. 2006) (holding that plan fiduciaries include those "who exercise[] discretionary control or authority over a plan's management, administration, or assets"); 29 U.S.C. § 1002(21)(A). Finally, as named Plan administrator during the class period, the Plan Committee was correctly alleged to be a fiduciary. 29 U.S.C. § 1102(a)(1).

Although properly alleged to be fiduciaries with respect to the Plan, Defendants argue that they were not acting in a fiduciary capacity when they incorporated the SEC filings into the Plan documents. The district court identified *Varity Corp. v. Howe*, 516 U.S. 489 (1996), as an important precedent on the question of whether an employer was acting in a fiduciary capacity when making statements about a company's financial health. In *Varity*, the Court found that a defendant employer engaged in plan administration—therefore acting in a fiduciary capacity—when he intentionally connected his statements about the financial health of a division of the company to statements about the future of plan benefits. *Id.* at 504. In applying *Varity*, the district court only looked to the initial filing of the SEC disclosures and found "no factual allegations, however,

which indicate that the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund." Though *Varity* contains some applicable law, it primarily addresses the determination of when employer statements made outside the course of plan administration rise to the level of fiduciary communications. Such is not the case here. The Defendants were engaged in Plan administration: they were undertaking an ERISA-mandated fiduciary duty—the provision of information to Plan participants through the required SPD. See 29 U.S.C. § 1022. In this context, our job is to inquire whether the Amended Complaint plausibly alleged that Defendants committed a breach of fiduciary duty when, under the facts alleged, they chose to incorporate by reference Fifth Third's SEC filings into the Plan's SPD.

No circuit court has answered the question of whether the express incorporation of SEC filings into an ERISA-mandated SPD is a fiduciary communication. Defendants rely extensively on *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), but the case provides no authority on this issue. The Fifth Circuit there addressed the question of whether the incorporation of SEC filings into a plan's prospectus is a fiduciary communication. It reasoned that the misrepresentations were not actionable under ERISA because they were only contained in the plan's prospectus and Form S-8 registration, and the defendant was obligated to file those documents under the securities laws and did not disseminate them to the plan participants. *Id.* at 257; *accord Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1283-84 (11th Cir. 2012) (incorporation of SEC filings into Form S-8 and stock

prospectus are not fiduciary acts). That is not the case before us. And our case is the very situation the Fifth Circuit in *Kirschbaum* recognized was not before it. 526 F.3d at 257 (distinguishing a district court case where an employer "had used the 10a Prospectus as the Summary Plan Description ('SPD') for ERISA purposes," noting that "Kirschbaum makes no such claim, and the record reveals that the REI defendants issued a separate document to serve as the SPD") (citing *In re Dynegy, Inc. Erisa Litig.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004)). Thus, *Kirschbaum* is, on its face, inapplicable.

We next review cases within our Circuit. A majority of district courts in this Circuit have found that incorporation of SEC filings into plan documents is a fiduciary act. *Compare Griffin v. Flagstar Bancorp, Inc.*, No. 2:10-cv-10610, 2011 WL 1261196, at *17 (E.D. Mich. Mar. 31, 2011) (dismissing the case under Rule 12(b)(6) but recognizing the principle that if certain financial information is distributed by a defendant or incorporated into plan documents, that information must be complete and accurate), *overruled by Griffin v. Flagstar Bancorp, Inc.*, 2012 WL 2989231 (6th Cir. July 23, 2012) (reversing the district court's dismissal under Rule 12(b)(6) because the complaint set forth a "plausible claim for breach of fiduciary duty"), *and In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 955 (W.D. Tenn. 2010) ("[S]ince it is universally accepted that ERISA fiduciaries are liable for making misrepresentations in plan documents, they should also be prohibited from incorporating into plan documents other documents that make material misrepresentations about the company and then disseminating those misrepresentations to plan

participants." (quoting *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 642 (N.D. Ohio 2009))), *and In re General Motors ERISA Litig.*, No. 05-71085, 2007 WL 2463233, at *6 (E.D. Mich. Aug. 28, 2007) (holding that defendants were engaged in acts of plan administration when they produced plan documents referencing various SEC filings that were allegedly misleading), *with Benitez v. Humana, Inc.*, No. 3:08CV-211-H, 2009 WL 3166651, at *10 n.6 (W.D. Ky. Sept. 30, 2009) ("[T]he preparation of SEC filings is not a fiduciary act for purposes of ERISA, even if the SEC filings are incorporated by reference into ERISA documents."). The majority line of cases correctly resolves this issue.

The Amended Complaint plausibly alleges Defendants breached their fiduciary duties by intentionally incorporating Fifth Third's SEC filings into the Plan's SPD and thereby conveying misleading information to Plan participants. ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD. *See* 29 U.S.C. § 1022. Defendants exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock, an investment option in the Plan. *See Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) (distinguishing between business and fiduciary decisions, and stating that "[a]n employer is said to act in a fiduciary capacity when it communicates with employees about their benefits because, in essence, the employer puts on its plan administrator hat and undertakes action designed to carry out an important purpose of the plan"). The SPD is a fiduciary communication to plan participants and

selecting the information to convey through the SPD is a fiduciary activity. Moreover, whether the fiduciary states information in the SPD itself or incorporates by reference another document containing that information is of no moment. To hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach. Such a result is inconsistent with the intent and stated purposes of ERISA—to impose fiduciary duties "which are the highest known to the law," *Pfeil*, 671 F.3d at 591—and would create a loophole in ERISA large enough to devour all its protections.

We hold that Count I of the Amended Complaint—including the allegations that Defendants breached their fiduciary duties (1) by continuing to offer Fifth Third Stock as a Plan investment option and failing to divest the Plan of the Stock and (2) by providing false and misleading information and failing to provide complete and accurate information about the Stock to Plan participants—states a claim upon which relief may be granted.[2] The allegations of Count I easily

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[2] Defendants argue that to the extent Plaintiffs allege the Defendants failed to timely disclose adverse corporate information, the Plaintiffs could not show loss causation. The district court agreed, concluding that under the efficient market theory any disclosed negative information would have been immediately assimilated by the market and reflected in the price of Fifth Third Stock. This argument is ill-timed and without merit. Whether losses would have been more or less significant following timely disclosure is speculative and, even if the question raised issues of causation and damages, such would be inappropriate for resolution

satisfy the requirements that there be a plausible allegation that a fiduciary breached its duty to the plan and a causal connection between that breach and the harm suffered by the plan.

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at the motion to dismiss stage. *See Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 643 (N.D. Ohio 2009) (quoting *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 863 (N.D. Ohio 2006)). Further, as courts have recognized:

> Assuming that Defendants in fact concealed and misrepresented material information on [the company stock], it is not evident that full public disclosure of the true facts would not have prevented as [sic] least some of the losses allegedly incurred by the Plan. Disclosure might not have prevented the Plan from taking a loss on [company] stock it already held; but it would have prevented the Plan from acquiring (through Plaintiffs' uninformed investment decisions and through continued investment of matching contributions) additional shares of overpriced [company] stock: the longer the fraud continued, the more of the Plan's good money went into a bad investment; and full disclosure would have cut short the period in which the Plan bought at inflated prices.

In re Honeywell Int'l ERISA Litig., No. 03-1214, 2004 WL 3245931, at *12 (D.N.J. Sept. 14, 2004); *id.* at *12 n.17 ("In addition, as Plaintiffs suggest, although the Plan could not have sold Honeywell stock without full disclosure, it could have refrained from purchasing more without such disclosure."); *see also Pietrangelo v. NUI Corp.*, No. 04-3223, 2005 WL 1703200, at *4 (D.N.J. July 20, 2005) (holding that the efficient market theory is inapplicable at the motion to dismiss stage and noting that defendants "could have minimized Plan losses without disclosing adverse information by simply removing NUI stock as an investment option"). For these reasons, an efficient market theory does not foreclose Plaintiffs' ability to establish damages or loss causation.

C. Counts II, III, and IV of the Amended Complaint

Because the district court erred in dismissing Plaintiffs' prudence and disclosure claims under Count I, we reverse and remand the case. In its ruling below, the district court did not substantively analyze the plausibility of Counts II through IV because it found them derivative of Count I, which the court found deficient. These remaining Counts do present claims dependent upon the fiduciary breach allegations of Count I that we have found plausibly state a claim for relief. Based on our holding, we return Counts II through IV to the district court to address in accordance with the principles stated herein.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court judgment dismissing the Amended Complaint and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed September 5, 2012]

JOHN DUDENHOEFER, on behalf of himself and all others similarly situated; ALIREZA PARTOVIPANAH, Plaintiffs - Appellees,	)
v.	)
FIFTH THIRD BANCORP; KEVIN T. KABAT; PAUL L. REYNOLDS; THE PENSION AND PROFIT SHARING COMMITTEE; NANCY PHILLIPS; GREG CARMICHAEL; ROBERT SULLIVAN; MARY TUUK; JOHN DOES 1–20, Defendants - Appellees.	)

Before: COOK and STRANCH, Circuit Judges; LAWSON, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing the Amended Complaint is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:08-CV-538

[Filed November 24, 2010]

John Dudenhoeffer,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Fifth Third Bancorp, et al.,	)
	)
Defendants.	)
	)

ORDER

This matter is before the Court on Defendant Fifth Third Bancorp, et al.'s motion to dismiss the amended consolidated class action complaint (Doc. No. 56). For the reasons that follow, Defendants' motion to dismiss is well-taken and is **GRANTED.**

I. Background

Plaintiffs John Dudenhoeffer and Alireza Partovipanah, both former employees of Fifth Third Bancorp, filed suit against Defendant Fifth Third Bancorp and several individual Defendants[1] on behalf on themselves and a class of similarly-situated individuals for alleged violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. Plaintiffs are participants in the Fifth Third Bancorp Master Profit Sharing Plan ("the Plan") and invested in Fifth Third common stock through the Plan during the class period.

The complaint has four counts. Count I generally alleges that Defendants breached their fiduciary duty to Plaintiffs and the class, in violation of 29 U.S.C. § 1109, by maintaining Fifth Third stock as an investment option after it become imprudent to do so. Count I also alleges that Defendants breached their fiduciary duty by failing to provide complete and accurate information to the plan participants about Fifth Third's financial condition and the prudence of investing in Fifth Third stock. Finally, Count I alleges that Defendants breached their fiduciary duty to plan participants by maintaining its pre-existing investment in Fifth Third stock, i.e., not divesting the Plan of Fifth Third stock, after it became an imprudent investment for the Plan.

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[1] The individual Defendants are Kevin T. Kabat, Fifth Third's Chief Executive Officer and President, the members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee, Paul L. Reynolds, Nancy Phillips, Greg Carmichael, Robert Sullivan, Mary Tuuk, and other John Doe Defendants.

Count II alleges that some of the individual Defendants breached their fiduciary duties to the plan participants by failing to monitor the performance of persons charged with managing the Plan's assets despite their knowledge that investing in Fifth Third stock was an imprudent option.

Count III alleges that some of the individual Defendants violated ERISA by failing to avoid or ameliorate conflicts of interest, which in turn allegedly compromised their ability to act in the best interests of the plan participants.

Count IV alleges that Defendants breached their fiduciary duties to the plan participants by failing to correct known breaches of fiduciary duties, by participating in breaches of fiduciary duty, or enabling breaches of fiduciary duty, in violation of 29 U.S.C. § 1105.

The complaint sets out in detail the nature and operation of the Plan. Consolidated Class Action Complaint (Doc. No. 54) ¶¶ 37-51. Generally, however, the Plan is a defined contribution profit sharing plan with a 401(k) feature. Plan participants can make contributions to the Plan and can direct the Plan to make investments in any one of 20 separate investment funds, including one fund that invests entirely in Fifth Third common stock, except for short-term liquid assets to accommodate the liquidity needs of the fund. Fifth Third also matches up to 4% of each employee's pre-tax contributions. The matching contributions are invested initially in the Fifth Third Stock Fund, but participants have the right to move these contributions to other funds. Although the

parties dispute this point, as the Court explains infra, at 6-10, the Fifth Third Stock Fund of the Plan is an employee stock ownership fund ("ESOP") under ERISA.

The complaint contains 281 paragraphs and is 78 pages long. The alleged breaches of fiduciary duty generally arise, however, out of the same fact pattern set forth in Eshe Fund v. Fifth Third Bancorp, Case No. 1:08-CV-421 (S.D. Ohio) (Beckwith, S.J.), a securities fraud class action that has been consolidated with this one for purposes of discovery. For present purposes, it is sufficient to note that the complaint alleges that during the class period, Fifth Third switched from being a conservative lender to a subprime lender. As a result, Fifth Third's loan portfolio became increasingly at risk due to defaults. The complaint alleges that this change in lending philosophy and/or mismanagement of the company made investing in Fifth Third common stock too risky for a retirement plan, that Defendants knew or should have known that Fifth Third stock was too risky, that they should have stopped further investment of Plan assets in Fifth Third stock, and that they should have divested the Plan of Fifth Third stock. The complaint alleges that the price of Fifth Third stock declined 74% from the beginning of the class period, July 19, 2007, through September 18, 2009. Complaint ¶ 50.

Defendants now move to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This motion has been fully briefed and is now ready for disposition.

II. Rule 12(b)(6) Standard of Review

A motion to dismiss for failure to state a claim operates to test the sufficiency of the complaint. The trial court must construe the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded factual allegations. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). The court need not accept as true legal conclusions or unwarranted factual inferences. Lewis v. ACB Business Servs., Inc., 135 F.3d 389, 405 (6th Cir. 1998).

The complaint, however, must contain more than labels, conclusions, and formulaic recitations of the elements of the claim. Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 295 (6th Cir. 2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The factual allegations of the complaint must be sufficient to raise the right to relief above the speculative level. Id. Nevertheless, the complaint is still only required to contain a short, plain statement of the claim indicating that the pleader is entitled to relief. Id. (citing Erickson v. Pardus, 551 U.S. 89, 93 (2007)). Specific facts are not necessary and the pleader is only required to give fair notice of the claim and the grounds upon which it rests. Id. To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). Mere conclusions, however, are not entitled to the assumption of truth. Id. at 1950. A claim is facially plausible if it contains content which allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. at 1949. Plausibility is not the same as probability, but the complaint must plead more than a possibility that the defendant has acted unlawfully. Id. If the complaint pleads conduct which is only consistent with the defendant's liability, it fails to state a plausible claim for relief. Id.

III. Analysis

Defendants' motion to dismiss starts with the premise that the Fifth Third Stock Fund is an ESOP. Because this fund is an ESOP, Defendants argue, they are entitled to a presumption that their decision to maintain the investment in, and decision not to divest the fund of, Fifth Third common stock is entitled to deference. Moreover, Defendants argue, the complaint fails to allege facts which overcome the presumption that investment in Fifth Third stock was reasonable. Thus, Defendants continue, the breach of fiduciary duty claims alleged in Count I fail as a matter of law. Additionally, Defendants argue, because the remaining breach of fiduciary duty claims are derivative of or dependent on Count I, they fail as well. The Court agrees.

B. Breach of Fiduciary Duty Concerning Retaining Fifth Third Stock as an Investment Option for the Plan

1. The Fifth Third Stock Fund is an ESOP

The first issue that needs to be resolved is whether the Fifth Third Stock Fund is an ESOP. Fifth Third

initially argues that Plaintiffs are not entitled to litigate this issue because then-Magistrate Judge Black determined in an earlier case, Shirk v. Fifth Third Bancorp, No. 05-CV-049, 2009 WL 692124, at *11 (S.D. Ohio Jan. 29, 2009), that the Fifth Third Stock Fund is an ESOP. Plaintiffs argue that Judge Black's decision is not res judicata on this issue because they were not parties in Shirk. The Court need not, however, resolve the collateral estoppel issue because the Fifth Third Stock Fund plainly is an ESOP.

An ESOP is "a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities[.]" 29 U.S.C. § 1107(d)(6)(A). The Sixth Circuit apparently has not addressed whether the ESOP determination is a question of law that can be decided at the pleading stage by reviewing the plan documents or whether it is a question of fact to be decided sometime after fact discovery is completed. District courts in the Sixth Circuit have reached opposition conclusions. See In re Ford Motor Co. ERISA Litigation, 590 F. Supp.2d 883, 903 (E.D.Mich. 2008) (question of law for trial court); In re General Motors ERISA Lit., No. 05-71085, 2006 WL 897444 at *7 (E.D.Mich. Apr. 6, 2006) (same); In re Diebold Erisa Lit., No. 5:06-CV-0170, 2008 WL 2225712, at *8 (N.D. Ohio May 28, 2008) (fact questions preclude determination of plan's ESOP status at pleading stage); Shirk v. Fifth Third Bancorp, No. 05-cv-49, 2007 WL 1100429, at *9 (S.D. Ohio Apr. 10, 2007) (Black, M.J.)

(same).[2] Generally, however, interpretation of an ERISA plan is made by simply reviewing the language of the plan. Kolkowski v. Goodrich Corp., 448 F.3d 843, 850 (6th Cir. 2006). Resort to extrinsic evidence to aid in interpretation is permissible only when the terms of the plan are ambiguous. Id. Thus, in this case, unless review of the pertinent plan provisions reveals some ambiguity, this Court sides with those decisions that have concluded that whether the plan is an ESOP can be determined at the motion to dismiss stage by reviewing the plan documents.

As indicated, in order to qualify as an ESOP, the plan must "invest primarily in qualifying employer securities" and meet such other requirements as are prescribed by 26 U.S.C. § 401. See, supra. Here, Section 7.4 of the Plan designates the "Fifth Third Stock Fund" as an investment option and states that the "fund shall be primarily invested in shares of common stock of Fifth Third Bank." Fifth Third Bancorp Master Profit Sharing Plan § 7.4(a) (Doc. No. 54-5, at 39). And, indeed, the ESOP Annual Information Schedule filed with Fifth Third's IRS Form 5500 indicates that the fund invests only in Fifth Third common stock. Doc. No. 56-6, at 11-13. The other principal requirement is that the plan document must formally designate the plan as an ESOP. 29 C.F.R. § 2550.407d-6(a)(2). The Plan also meets this requirement because Section 1.2

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[2] Interestingly, however, although then-Magistrate Judge Black determined in this order that whether the plan is an ESOP cannot not be determined at the motion to dismiss stage, at the summary judgment stage he determined that the plan was an ESOP almost solely by reference to the plan documents. See Shirk, 2009 WL 692124, at *11.

states that the Fifth Third Stock Fund "shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code, designed to invest primarily in qualifying employer securities." Doc. No. 56-2, at 3. Thus, the Fifth Third stock fund unambiguously is an ESOP.

Plaintiffs argue, however, that this fund is not an ESOP because overall Section 3.3(a) of the Plan allows the plan administrator to discontinue or change investment options when it becomes prudent to do so. Additionally, Plaintiffs point out that § 7.4 of the Plan actually allows investment in short-term liquid assets. Neither of these arguments alter the conclusion that the Fifth Third Stock Fund is an ESOP. Regarding the latter argument, the authority to invest in short-term liquid assets clearly is simply a provision to allow the plan administrator to have cash or cash-equivalents in hand to pay out anticipated distributions. There is no indication that the Plan intended short-term liquid assets to be an alternative investment option for this fund. The former provision cited by Plaintiffs does nothing more than recognize that the plan administrators have an ongoing duty to monitor the performance of the investment funds selected for the Plan. This section, however, does not affect the characterization of the stock fund as an ESOP because the principal inquiry is not whether the plan administrators have authority to discontinue the fund, but rather whether it "invest[s] primarily in qualifying employer securities." As just stated, the record indicates that the Fifth Third Stock Fund is intended to and does invest primarily in Fifth Third common stock.

Accordingly, the Court concludes that the Fifth Third stock fund is an ESOP.

2. ESOPs and Breach of Fiduciary Duty Claims

The determination that the Fifth Third Stock Fund is an ESOP is an important one because it affects the consideration of whether the plan administrators fulfilled their fiduciary duties to the plan participants.

The case ultimately controlling the disposition of Defendants' motion to dismiss on this issue is Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995). Kuper discussed in some detail an appropriate way to reconcile the statutory exemption of ESOPS from ERISA's diversification requirements from ERISA's overall requirement that fiduciaries must act in the best interests of plan participants at all times and properly manage employee benefit plans. Id. at 1457-59. The Court need not recapitulate all of that analysis here. It is sufficient for present purposes to state that the Kuper Court held that if the plan is an ESOP, the plan fiduciaries start with a presumption that their "decision to remain invested in employer securities was reasonable." Id. at 1459. In other words, the plan administrator's decision to remain invested in employer securities presumptively is not a breach of fiduciary duty. The plaintiff may overcome "this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Id. Thus, in this case, Defendants start with a presumption that their decision to remain invested in Fifth Third stock was reasonable. Consequently, in order to state a claim for breach of fiduciary duty, Plaintiffs must plead facts

sufficient to overcome the presumption of reasonableness.

Plaintiffs argue that it is inappropriate to apply the Kuper presumption at the motion to dismiss stage and cite various district court cases to that effect. This question also presents another split of authority among district courts. Cf. In re The Goodyear Tire & Rubber Co. ERISA Lit., 438 F.Supp.2d 783, 793 (N.D. Ohio 2006) (identifying split). In light of Twombly and Iqbal, however, if the plan at issue is an ESOP, as in this case, there really is no choice but to apply the Kuper presumption at the pleading stage. As stated above, Twombly and Iqbal require the complaint to state a claim that is plausible on its face. If an ESOP plan fiduciary starts with a presumption that the decision to remain invested in plan securities was reasonable, then a claim for breach of fiduciary duty only becomes plausible if there are sufficient facts alleged to conclude that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." A number of courts have reached the same conclusion for more or less the same reason. See In re Citigroup Erisa Lit., No. 07 Civ. 9790, 2009 WL 2762708, at *16 (S.D.N.Y. Aug. 31, 2009) (collecting cases); see also Morrison v. MoneyGram Int'l, Inc., 607 F. Supp.2d 1033, 1052 (D.Minn. 2009) ("To say that the presumption of prudence 'applies' at the pleading stage is just another way of saying that plaintiffs must allege sufficient facts to demonstrate that they have a non-speculative claim that the fiduciary abused its discretion (or otherwise acted in a manner that would overcome the [Kuper] presumption)."). Accordingly, the Court concludes that the Kuper presumption of prudence may be applied at the pleading stage.

3. The Complaint Fails to Allege Facts Which Overcome the Presumption of Reasonableness

The next question that arises is what kind of facts must the plaintiff allege to overcome the presumption of reasonableness. In Kuper, the Court held that the following facts were insufficient to overcome the presumption of reasonableness: 1) defendants admitted that they did not consider diversifying or liquidating the ESOP despite their knowledge of the company's financial difficulties; 2) the company's CEO had sold all of his shares of company stock; and 3) the company should have considered diversifying or liquidating the ESOP when transfer of their ESOP shares to the purchaser of their particular division was delayed (plaintiffs claimed at the point of sale of their division, they no longer had the same interest in the company that they had while employees of the company). 66 F.3d at 1459. With respect to the plaintiffs' first contention, the Court held that in order for a fiduciary to be liable for failure to investigate other investment options, the plaintiff must also show that a reasonable investigation would have shown that the investment at issue was imprudent. Id. at 1459-60. In that particular case, which was decided on summary judgment, the Court held that plaintiffs had failed to show that holding onto the company stock was imprudent because defendants had shown that the price of the stock fluctuated during the class period and several investment advisors recommended holding it. Id.

Kuper appears to be the only Sixth Circuit decision which discusses whether the plaintiffs have adduced sufficient facts to overcome the presumption of reasonableness. The other Circuit Courts have not laid

down a general rule of applicability either. They do, however, tend to use the facts in Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995), the case which first articulated the reasonableness presumption adopted in Kuper, as a baseline for comparison. In Moench, where the Court remanded the case for further development of the record in light of its new presumption of reasonableness standard, the plaintiffs had adduced facts showing that the company stock had declined from $18.25 to less than $.25 per share in a two-year period, federal regulators had warned the company directors that the company was on the verge of collapse, there were various regulatory violations, the FDIC eventually took over the company, and the company ultimately filed for bankruptcy under Chapter 11. See id. at 557.

Thus, in Edgar v. Avaya, Inc., 503 F.3d 340 (3rd Cir. 2007), while the Court pointed out that it had never held that the company had to be on the brink of bankruptcy before divesting a plan of employer securities was required, it concluded that plaintiff had failed to allege facts showing that the company was in a "dire situation" requiring it to discontinue offering company stock and divesting the plan of company securities. Id. at 348, 349 n.13. The facts that plaintiff relied on were that the costs of integrating an acquisition into the company were higher than publicly represented, the acquisition had a negative effect on the company's earnings, changes to the method of delivering products were causing severe disruptions in service, and there was a drastic reduction in demand for the company's products. Id. at 348. The Court concluded that these were "bare allegations of fraud and other wrongdoing" which were insufficient to

overcome the presumption of reasonableness, particularly where the price of the stock rebounded within about 2 months of the company's disappointing earnings release. Id. at 348 n.13.

In Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008), the price of company stock dropped about 40% when it was revealed that some employees were engaged in fraudulent energy transactions which had the effect of inflating the company's earnings by about 10% over a three-year period. Id. at 247. The Court concluded, however, that the plaintiffs had failed to overcome the presumption of reasonableness because "[t]here [was] no indication that REI's viability as a going concern was ever threatened or that REI's stock was in danger of essentially becoming worthless." Id. "This is a far cry," the Court stated, "from the downward spiral in Moench, and much less grave than facts other courts routinely conclude are insufficient to rebut the Moench presumption." Id.

In Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004), the Court concluded that plaintiff had failed to allege facts sufficient to overcome the Moench presumption.[3] There, the company's merger with another company, followed by a reverse stock split, caused the price of the company stock to drop from $28.94 per share to $7.94, per share. Id. at 1095-96. The Court concluded that these facts were

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[3] It should be noted that in Wright, the Court only assumed that the Moench standard applied but it did not specifically adopt the standard in that opinion. See Wright, 360 F.3d at 1097, 1097 n.3. The Ninth Circuit did, however, adopt Moench in a recent decision. See Quan v. Computer Serv. Corp., 623 F.3d 870 (9th Cir. 2010).

insufficient to overcome the presumption of reasonableness because the case "did not present a situation where a company's financial situation is seriously deteriorating and there is a genuine risk of self-dealing." Id. at 1098. The Court noted further that the company's published earnings and financial statements "demonstrate that Oremet was a far cry from the sort of deteriorating financial circumstances involved in Moench and was, in fact, profitable and paying substantial dividends throughout that period." Id. at 1099. The Court stated that "mere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the Moench presumption." Id.

In this case, although the complaint's allegations perhaps demonstrate that Fifth Third's foray into subprime lending was ill-conceived and ill-considered, in light of the comparators just discussed, the Court concludes that Plaintiffs have failed to allege facts which overcome the presumption that Defendants' decision to remain invested in Fifth Third stock was reasonable. The complaint demonstrates that Fifth Third took substantial write-downs of non-performing assets during the class period and that it was required to take measures to bolster its Tier 1 capital, including selling shares of preferred stock to the government under the Capital Purchase Program.[4] The complaint

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[4] The complaint states that Fifth Third's sale of preferred securities to the government occurred under the Troubled Asset Relief Program ("TARP") and is evidence of Fifth Third's weakened financial condition. Complaint ¶ 178. The complaint then goes on to provide the definition of "troubled assets." While a component of the TARP program, the sale of preferred securities to the

also demonstrates that the price of Fifth Third stock declined during the class period from $25.61 in December 2007, Complaint ¶ 50, to a low of $2.85 per share on January 22, 2009. Complaint ¶ 177. The complaint also shows, however, that the price of Fifth Third rebounded substantially from that low and was trading at $10.24 per share as of September 18, 2009. Complaint ¶ 50. Nevertheless, the 75% decline in the price of Fifth Third stock during the class period alleged by the complaint is commensurate with declines in the stock prices in the cases discussed above which were insufficient as a matter of law to overcome the presumption of prudence. E.g. Wright, 360 F.3d at 1095-96 (72% decline in price insufficient to overcome presumption of reasonableness).

On the other hand, the complaint states that Fifth Third is "a diversified financial services company" with "16 affiliates and 1,311 full-service Banking Centers." Complaint ¶ 28. In other words, the complaint suggests that Fifth Third is and was a viable, on-going concern despite the problems created by its alleged subprime loan portfolio. Plaintiffs dispute the relevance of Fifth Third's viability in assessing the prudence of maintaining employer securities in the Plan, Doc. No. 59, at 43, and thus, as Defendants point out, apparently do not dispute that Fifth Third was not in danger of collapsing during the class period. Plaintiffs

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government occurred under the Capital Purchase Program and did not involve a direct purchase of toxic assets or bad loans by the government. Thus, the complaint incorrectly implies that the government acquired Fifth Third's bad loans. As explained further, infra, only viable and financially healthy financial institutions were permitted to participate in the Capital Purchase Program.

could not be more wrong, however, about the relevance of Fifth Third's ongoing viability to the issue whether they can overcome the presumption of prudence. As the cases discussed supra indicate, the fact that the company remained viable despite a substantial drop in the stock price is a strong indicator that no breach of fiduciary duty occurred by remaining invested in employer securities.

While the complaint relies on allegations that some analysts downgraded Fifth Third stock from "hold" to "sell" or otherwise recommended against purchasing Fifth Third stock to establish imprudence, complaint ¶¶ 182-83, Fifth Third has submitted SEC filings indicating that several large state pension funds continued to hold, and in some cases actually increased their positions in Fifth Third stock during the class period. Doc. No. 56-9; see City of Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 655 n.1 (6th Cir. 2005) (court may take judicial notice of public records on a Rule 12(b)(6) motion). In fact, the New York State Teachers Retirement System quadrupled its position in Fifth Third stock between March 31, 2007 and December 31, 2008. Plaintiffs again dispute the relevance of this information, but in the Court's view, the fact that other pension funds held and increased their positions in Fifth Third stock is analogous to the situation Kuper where the Court held that the plan fiduciaries acted prudently because several analysts recommended holding the company's stock. See supra at 13.

Moreover, while the complaint views Fifth Third's participation in the Capital Purchase Program ("CPP") as a stigma and a sign of financial stress, the Treasury

Department states that the purpose of the CPP was "to stabilize the financial system by providing capital to viable financial institutions of all sizes throughout the nation." See Capital Purchase Program (available at http://www.financialstability.gov/roadtostability/capitalpurchaseprogram.html) (visited November 18, 2010) (emphasis added). Indeed, the Treasury Department goes on to state that "[p]articipation [in the CPP] was reserved for healthy, viable financial institutions that were recommended by their applicable federal banking regulator." See Factsheet on Capital Purchase Program (available at http://www.financialstability.gov/roadtostability/CPPfactsheet.htm) (visited November 18, 2010) (emphasis added). Thus, Fifth Third's participation in the CPP is actually a sign of its viability and another indication that the Defendants' decision to remain invested in Fifth Third stock was not imprudent.

The foregoing discussion should sufficiently illustrate that the complaint fails to plead facts necessary to overcome the presumption of reasonableness. While the Court must accept that Fifth Third embarked on an improvident and even perhaps disastrous foray into subprime lending, which in turn caused a substantial decline in the price of its common stock, the complaint fails to establish that Fifth Third was in the type of dire financial predicament sufficient to establish a breach of fiduciary duty under Kuper and Moench. Fifth Third remained a viable company throughout the class period and, while not back to its pre-class period level, Fifth Third stock has rebounded substantially from its nadir. The complaint fails to establish any facts which would have caused a reasonable fiduciary to cease offering Fifth Third stock

as an investment option and/or divest Fifth Third stock from the Plan entirely. Indeed, as indicated, several large pension funds actually increased their holdings in Fifth Third stock during the class period. Finally, the Court finds that it makes little or no difference to the analysis that Plaintiffs allege that the price of Fifth Third stock was artificially inflated during the class period due to its lending practices. As the Court stated in Kirschbaum:

> Kirschbaum contends that the court's presumption in favor of continued company stock investment should not apply at all where allegations, like his, relate to the fiduciaries' knowing purchases of stock at an artificially inflated price. Moench, Kirschbaum argues, concerned a "mere" failure to diversify. We reject this limitation. The distinction between these allegations is not only often elusive, but hardly justified by Moench itself. The opinion dwelt at length on the Benefits Committee's internal discussions based on their insider knowledge and fears about the company's dire financial prospects. More to the point, there is no principled difference between how a fiduciary should respond to "artificial inflation" of the stock price as opposed to other sorts of negative insider information. Consequently, the standard of judicial review applicable to such decisions should not generally turn on pleading artifices. The Moench presumption logically applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock.

526 F.3d at 254 (emphasis added).

The complaint fails to allege facts demonstrating the Defendants' decision to continue to allow plan participants to invest in Fifth Third stock was imprudent. The Court agrees with Defendants that Plaintiffs are generally attempting to challenge the wisdom of Fifth Third's business judgment and/or attempting to recover damages based on alleged mismanagement of the company, neither of which are actionable theories of recovery under ERISA. See Kuper, 66 F.3d at 1456 ("Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards.") (quoting Berlin v. Michigan Bell Tele. Co., 858 F.2d 1154, 1163 (6th Cir. 1988)); Husvar v. Rapoport, 430 F.3d 777, 782 (6th Cir. 2005) ("A claim that company directors did not operate the business itself in conformity with sound business practices does not, however, implicate the protections afforded by ERISA.").

Accordingly, Defendants' motion to dismiss Plaintiffs' breach of fiduciary duty claim to the extent it relies on the continued offering of and failure to divest of Fifth Third common stock is well-taken and is **GRANTED**.

B. Failure to Provide Complete and Accurate Information About Fifth Third Stock

Count I also alleges that Defendants breached their fiduciary duty by failing to provide plan participants with complete and accurate information about Fifth Third stock. The alleged misstatements and omissions to which the complaint refers (paragraphs 113-163) for the most part were made in corporate SEC filings such

as Forms 10-Q and 10-K. Additionally, the complaint alleges that Fifth Third made misleading statements in press releases and other public fora, such as presentations to industry analysts. Generally speaking, the complaint alleges that the statements and omissions were misleading because Fifth Third failed to disclose such information as changing from its traditional conservative lending philosophy, its deteriorating Tier 1 capital quality, the qualifications of its Alt-A borrowers, its failure to set aside adequate reserves for non-performing loans, and its failure make timely reserves for non-performing loans. Fifth Third argues that these alleged misstatements and omissions are not actionable under ERISA because SEC filings are not statements made to participants in a fiduciary capacity. Plaintiffs, on the other hand, contend that these statements were made in a fiduciary capacity because the Plan and the Plan's summary plan description incorporate by reference Fifth Third's SEC filings.

The principal requirement under ERISA for a breach of fiduciary duty claim based on a misstatement or omission is that the statement must have been made in the defendant's fiduciary capacity. Moore v. LaFayette Life Ins. Co., 458 F.3d 416, 433 (6th Cir. 2006). The Court first notes that to the extent the complaint relies on public statements, such as press releases and statements made during conference calls and group presentations, concerning the financial outlook or financial performance of Fifth Third, the complaint fails to state a claim for breach of fiduciary duty. These statements were not made in a fiduciary capacity and are not actionable as a matter of law. In re Ferro Corp. ERISA Lit., 422 F. Supp.2d 850, 865

(N.D. Ohio 2006); Complaint ¶¶ 114, 116, 119, 120, 121, 122, 135, 136, 137, 140, 153, 158, 159, 160, 161.

Whether the defendant speaks in a fiduciary capacity when SEC filings are incorporated by reference into plan documents is yet another area of ERISA which has engendered a split of authority and has not been resolved by the Sixth Circuit Court of Appeals. Compare In re AEP ERISA Lit., 327 F. Supp.2d 812, 825 (S.D. Ohio 2004) (SEC filings incorporated by reference into plan documents are fiduciary statements), with, Shirk v. Fifth Third Bancorp, No. 05-cv-049, 2009 WL 692124, at *17 (S.D. Ohio Jan. 29, 2009) (defendants act in a corporate capacity when making statements in SEC filings), and, Benitez v. Humana, Inc., No. 3:08CV-211-H, 2009 WL 3166651, at *10 n.6 (W.D.Ky. Sept. 30, 2009) ("[T]he preparation of SEC filings is not a fiduciary act for purposes of ERISA, even if the SEC filings are incorporated by reference into ERISA documents."); see also In re Lehman Brothers Sec. & Erisa Lit., 683 F. Supp.2d 294, 300 (S.D.N.Y. 2010) (stating that "emerging caselaw makes clear that those who prepare SEC filings do not become ERISA fiduciaries through those acts" even where such filings are incorporated into the summary plan description).

To the extent that the weight of opinion on this issue is evenly distributed, the Court agrees with Defendants that Varity Corp. v. Howe, 516 U.S. 489 (1996), breaks the tie. In Varity, the Court held that a defendant does not act as a fiduciary when he makes statements about the company's financial condition. Id. at 504. Rather, to act as a fiduciary, the defendant must intentionally connect his statements about the

financial status of the company to the ERISA benefit plan. Id. In this case, the alleged misstatements and omissions identified in the complaint all were made in the context of filing routine financial disclosures required under the federal securities laws and regulations. There are no factual allegations, however, which indicate that the speaker was intentionally connecting his statements about Fifth Third's financial condition to the Fifth Third Stock Fund. Accordingly, the Court concludes that the complaint fails to allege facts from which it can reasonably be inferred that the alleged misstatements and omissions were made in a fiduciary capacity.

Accordingly, Defendants' motion to dismiss this aspect of Count I is well-taken and is **GRANTED.**

Plaintiffs also allege in Count I that Defendants breached their fiduciary duties to the plan participants by not disclosing negative information about Fifth Third of which they were aware. ERISA does not impose a duty on fiduciaries to disclose information to plan participants beyond what the statute itself requires. Sprague v. General Motors Corp., 133 F.3d 388, 405-06 (6th Cir. 1998) ("It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed."); In re Ferro Corp. Erisa Lit., 422 F. Supp.2d 850, 864 (N.D. Ohio 2006) (ERISA fiduciaries have no duty to disclose non-public information about the company's financial condition). Additionally, as Defendants accurately point out, under the efficient market theory, any negative information disclosed about Fifth Third would have been immediately assimilated by the

market and reflected in the price of Fifth Third stock. Thus, earlier disclosure of the alleged omissions by the Defendants would not have prevented the plan participants from experiencing the decline the market value of their Fifth Third shares. See Edgar, 503 F.3d at 350;

Therefore, Count I fails to state a claim for relief for breach of fiduciary duty based on Defendants' alleged omissions and misstatements. Accordingly, Defendants' motion to dismiss Count I is well-taken and is **GRANTED.**

C. Counts II, III, and IV

Count II of the complaint alleges that the Defendants breached their fiduciary duty to the Plan participants by failing to monitor the performance of others who permitted the Plan to invest in Fifth Third common stock which, as already stated, they contend was an imprudent investment. Count III of the complaint alleges that the plan fiduciaries administered the Plan under a conflict of interest because they were compensated in part with Fifth Third stock and granted stock options. Count IV of the complaint alleges that the Defendants failed to remedy or correct the alleged breaches of fiduciary duty outlined in Count I of the complaint concerning allowing the Plan to invest in Fifth Third stock. Each of these claims is derivative of and dependent on proof of a primary breach of fiduciary duty. As already discussed, the complaint fails to allege facts to overcome the presumption that the plan fiduciaries' decision to allow the plan to remain invested in Fifth Third stock was reasonable. Since Count I - the

primary claim for breach of fiduciary duty in this case - fails to state a claim for relief, each of these derivative claims fails as a matter of law. Edgar, 503 F.3d at 349 n.13; In re Harley-Davidson, Inc. Sec. Lit., 660 F. Supp.2d 953, 969-70 (E.D.Wis. 2009); In re RadioShack Corp. ERISA Lit., 547 F. Supp.2d 606, 616 (N.D.Tex. 2008).

Accordingly, Defendants' motion to dismiss Counts II, III, and IV is well-taken and is **GRANTED.**

IV. Leave to Amend the Complaint

In their memorandum in opposition to the motion to dismiss, Plaintiffs ask the Court for leave to amend the complaint in the event Defendants' motion is granted. A request to amend the complaint in this fashion is not proper. Plaintiffs have not filed a separate and properly supported motion for leave to amend and they are not entitled to an advisory opinion on the weaknesses of their claims. PR Diamonds, Inc. v. Chandler, 364 F.3d 671, 699-700 (6th Cir. 2004); Begala v. PNC Bank, Ohio, Nat. Ass'n, 214 F.3d 776, 783-84 (6th Cir. 2000).

Accordingly, leave to amend the complaint is not well-taken and is **DENIED.**

IT IS SO ORDERED

Date November 24, 2010

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Case No. 1:08-CV-538

[Filed November 24, 2010]

John Dudenhoeffer,	)
Plaintiff,	)
	)
-vs-	)
	)
Fifth Third Bancorp, et al.,	)
Defendants.	)
	)

JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdicts.

X Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss the amended consolidated class action complaint is **GRANTED**. Plaintiff's motion for leave to amend the complaint is **DENIED.**

Date: November 24, 2010

James Bonini, Clerk

By: s/Mary C. Brown
Mary C. Brown, Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11-3012

[Filed October 12, 2012]

JOHN DUDENHOEFER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL.,

Plaintiffs-Appellants,

v.

FIFTH THIRD BANCORP, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: COOK and STRANCH, Circuit Judges; and LAWSON,* District Judge.

* Hon. David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX D

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising

control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect–

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. § 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of--

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2)(A) If this paragraph applies to an eligible individual account plan, the portion of such plan which consists of applicable elective deferrals (and earnings allocable thereto) shall be treated as a separate plan--

(i) which is not an eligible individual account plan, and

(ii) to which the requirements of this section apply.

(B)(i) This paragraph shall apply to any eligible individual account plan if any portion of the plan's applicable elective deferrals (or earnings allocable thereto) are required to be invested in qualifying employer securities or qualifying employer real property or both--

(I) pursuant to the terms of the plan, or

(II) at the direction of a person other than the participant on whose behalf such elective deferrals are made to the plan (or a beneficiary).

(ii) This paragraph shall not apply to an individual account plan for a plan year if, on

the last day of the preceding plan year, the fair market value of the assets of all individual account plans maintained by the employer equals not more than 10 percent of the fair market value of the assets of all pension plans (other than multiemployer plans) maintained by the employer.

(iii) This paragraph shall not apply to an individual account plan that is an employee stock ownership plan as defined in section 4975(e)(7) of Title 26.

(iv) This paragraph shall not apply to an individual account plan if, pursuant to the terms of the plan, the portion of any employee's applicable elective deferrals which is required to be invested in qualifying employer securities and qualifying employer real property for any year may not exceed 1 percent of the employee's compensation which is taken into account under the plan in determining the maximum amount of the employee's applicable elective deferrals for such year.

(C) For purposes of this paragraph, the term "applicable elective deferral" means any elective deferral (as defined in section 402(g)(3)(A) of Title 26) which is made pursuant to a qualified cash or deferred arrangement as defined in section 401(k) of Title 26.

(3) Cross references

(A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 1104(a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

(D) For diversification requirements for qualifying employer securities held in certain individual account plans, see section 1054(j) of this title.

(c) Election

(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of--

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) Definitions

For purposes of this section--

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account

plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

(4) The term "qualifying employer real property" means parcels of employer real property--

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and

sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is--

(A) stock,

(B) a marketable obligation (as defined in subsection (e) of this section), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of Title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfies the requirements of subsection (f)(1) of this section.

(6) The term "employee stock ownership plan" means an individual account plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

(9) For purposes of this section, an arrangement which consists of a defined benefit plan and an individual account plan shall be treated as 1 plan if the benefits of such individual account plan are taken into account in determining the benefits payable under such defined benefit plan.

(e) Marketable obligations

For purposes of subsection (d)(5) of this section, the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if--

(1) such obligation is acquired--

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation--

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

(f) Maximum percentage of stock held by plan; time of holding or acquisition; necessity of legally binding contract

(1) Stock satisfies the requirements of this paragraph if, immediately following the acquisition of such stock--

(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

(2) Until January 1, 1993, a plan shall not be treated as violating subsection (a) of this section solely by holding stock which fails to satisfy the requirements of paragraph (1) if such stock--

(A) has been so held since December 17, 1987, or

(B) was acquired after December 17, 1987, pursuant to a legally binding contract in effect on December 17, 1987, and has been so held at all times after the acquisition.

29 U.S. C. § 1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title

unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if–

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would

reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if--

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the

bank, trust company, or insurance company or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if--

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section

1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2014, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on August 17, 2006).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if--

(A) the transaction is--

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property

available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) of this section are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if--

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if--

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by--

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either--

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the

price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means--

(i) in the case of a security for which there is a generally recognized market--

(I) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) Foreign exchange transactions

Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as

defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if--

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or

provide investment advice, with respect to the transaction.

(19) Cross trading

Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if--

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure

regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross- trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition,

holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph--

(i) The term "security" has the meaning given such term by section 475(c)(2) of Title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of Title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction--

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees

(1) Section 1107(b) of this title and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly--

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of

Title 26), a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of Title 26).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such title.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 1107(d)(6) of this title) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term "owner-employee" shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of Title 26) who owns (or is considered as owning within the meaning of section 318(a)(1) of Title 26) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if--

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11) of this section.

(g) Provision of investment advice to participant and beneficiaries

(1) In general

The prohibitions provided in section 1106 of this title shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) Eligible investment advice arrangement

For purposes of this subsection, the term "eligible investment advice arrangement" means an arrangement--

(A) which either--

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) Investment advice program using computer model

(A) In general

An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) Computer model

The requirements of this subparagraph are met if the investment advice provided under the

investment advice program is provided pursuant to a computer model that--

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) Certification

(i) In general

The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) Renewal of certifications

If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) Eligible investment expert

The term "eligible investment expert" means any person--

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(D) Exclusivity of recommendation

The requirements of this subparagraph are met with respect to any investment advice program if--

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) of this section occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) Express authorization by separate fiduciary

The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) Annual audit

The requirements of this paragraph are met if an independent auditor, who has appropriate technical

training or experience and proficiency and so represents in writing--

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) Disclosure

The requirements of this paragraph are met if--

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)--

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the

development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser--

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) Other conditions

The requirements of this paragraph are met if--

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(8) Standards for presentation of information

(A) In general

The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) Model form for disclosure of fees and other compensation

The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) Maintenance for 6 years of evidence of compliance

The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) of this section have been met. A transaction prohibited under section 1106 of this title shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) Exemption for plan sponsor and certain other fiduciaries

(A) In general

Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice

referred to in section 1002(21)(A)(ii) of this title (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if--

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) Continued duty of prudent selection of adviser and periodic review

Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of

investment advice referred to in section 1002(21)(A)(ii) of this title. The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

(C) Availability of plan assets for payment for advice

Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 1002(21)(A)(ii) of this title.

(11) Definitions

For purposes of this subsection and subsection (b)(14) of this section--

(A) Fiduciary adviser

The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title by the person to a participant or beneficiary of the plan and who is--

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in subsection (b)(4) or a savings association (as defined in section 1813(b)(1) of Title 12), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title to a

participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14) of this section, except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) Affiliate

The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 80a-2(a)(3) of Title 15).

(C) Registered representative

The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-751

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IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*,
Petitioners

v.

JOHN DUDENHOEFFER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

THOMAS J. MCKENNA
GAINEY & MCKENNA
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

ANDREW L. ZIVITZ
Counsel of Record
JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

Counsel for Respondents

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QUESTIONS PRESENTED

1. Whether the complaint in this case plausibly alleged a claim for relief for a breach of fiduciary duty in violation of ERISA Section 404(a)(1), 29 U.S.C. Section 1104(a)(1).

2. Whether an ERISA fiduciary is absolutely immune from liability for a fiduciary breach for false statements made in a document that the fiduciary decided to incorporate by reference in a Summary Plan Description required by ERISA, *see* ERISA Section 102, 29 U.S.C. Section 1022, merely because the fiduciary himself was not the original author of the document.

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IN THE

Supreme Court of the United States

No. 12-751

FIFTH THIRD BANCORP, *et al.*,
Petitioners

v.

JOHN DUDENHOEFFER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

STATEMENT

This case arises from respondents' claim that petitioners breached their fiduciary duties to act prudently under ERISA Section 404(a)(1), 29 U.S.C. Section 1104(a)(1). The complaint alleges that petitioners, fiduciaries of a defined-contribution ERISA plan that held employer stock, knew or should have known that continuing to own and invest in the employer stock was imprudent and that its price was artificially inflated due to undisclosed risks of which they knew. The complaint alleges that, despite their knowledge, petitioners took no steps whatsoever to protect employees by restricting further investment

in the employer stock or divesting the stock already owned. The complaint also alleges that petitioners knowingly made materially false and misleading statements regarding the financial condition and prospects of the employer, and hence about the value of the employer's stock that the participants and beneficiaries were holding. Petitioners made those statements by incorporating by reference certain SEC filings, which petitioners knew contained the false and misleading statements, into the ERISA-required Summary Plan Description (SPD). The district court dismissed the complaint, but a unanimous panel of the court of appeals reversed, holding that the complaint plausibly alleged a breach of fiduciary duty under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and it remanded for further proceedings.

1. Fifth Third Bancorp is a bank holding company with operations in a number of States. This case concerns the Fifth Third Bancorp Master Profit Sharing Plan (Plan), which is a "defined contribution" retirement plan for employees that is sponsored by the bank. *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1, 255-256 (2008). Participants may specify that a portion of their salaries be directed to the Plan for investment. They may choose specific investments for their contributions, but only from among options preselected by the Plan fiduciaries. One of the authorized investments is the Fifth Third Stock Fund, which invests in Fifth Third stock itself. Pet. App. 4.

As the court of appeals explained:

> [T]he Plan is not invested solely in Fifth Third Stock, nor is it required to be: the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and

> does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates.

Pet. App. 4. For those who participate in the Plan, Fifth Third, as part of the employment bargain, matches up to the first 4% of an employee's contribution. Fifth Third's matching funds are initially invested in the Fifth Third Stock Fund, but participants may direct that the funds be moved to other investments. Pet. App. 4.

ERISA Section 102(a) requires that "[a] summary plan description [SPD] of any employee benefit plan shall be furnished to participants and beneficiaries," and it is to include a variety of information about the plan. 29 U.S.C. § 1022(a); see ERISA § 104(b), 29 U.S.C. § 1024(b) (requirements for publication of SPD). In this case, the Fifth Third Plan fiduciaries "chose to incorporate by reference Fifth Third's SEC filings into the Summary Plan Description," Pet. App. 4, to provide Plan participants with "important" information, Pet. App. 18.

2. Under ERISA, one or more named fiduciaries must have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The complaint in this case alleges that petitioners were fiduciaries of the Fifth Third Plan for at least some purposes—an allegation that they do not contest before this Court.

Section 404(a)(1) of ERISA, entitled "Fiduciary Duties," imposes a duty of loyalty on fiduciaries, who must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). It also provides that ERISA fiduciaries must act

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). ERISA fiduciaries must also act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

ERISA expressly requires fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Concentration in the stock of any issuer—including the employer—would likely violate both this specific diversification requirement and ERISA's general prudence requirement. In order to permit plans to hold concentrated investments in qualified employer stock, therefore, Congress provided an express exception from both the prohibition on diversification and the diversification component—but *only* the diversification component—of the prudence requirement:

> [I]n the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (*only to the extent that it requires diversification*) of paragraph (1)(B) is not violated by acquisition or holding of . . . qualifying employer securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (emphasis added). Thus, holdings of qualified employer stock

are an exception from the express diversification requirement and from the prudence requirement "*only to the extent that it requires diversification.*" ERISA contains no other exception from the prudence requirement for employer stock. Buying or holding employer stock, insofar as it is imprudent for reasons *other than* lack of diversification, may violate ERISA.

3. The complaint in this case alleges that in the period prior to July 19, 2007, Fifth Third "switched from being a conservative lender to a subprime lender, its loan portfolio became increasingly at risk due to defaults, and it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures." Pet. App. 4-5. The complaint alleges that petitioners, who include Fifth Third's President and CEO and other high-ranking executives, were aware of all these facts, and that, because these facts were not disclosed, Fifth Third's stock price was "artificially inflated before plummeting" in the ensuing period. Pet. App. 5.

The complaint alleges that petitioners, although aware of that "artificially inflated" price, "failed to take any action to protect participants from losses" and "continued to invest and to allow investment of the Plan's assets in [Fifth Third] stock even as Fifth Third's problems came to light." Complaint at 58 (¶ 198). Moreover, they did not make "appropriate public disclosures as necessary," did not "consult[] with DOL or independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan," and did not "resign[] as fiduciaries . . . to the extent that they could not loyally serve the Plan." *Ibid.* (¶197). Because Fifth Third stock constituted a substantial portion of the Plan's overall assets, the result was

devastating losses for Plan participants. *Id.* at 56-57 (¶¶ 188-196). The complaint alleges that petitioners' failure to act to protect participants was a violation of the requirement that they exercise ordinary "care, skill, prudence, and diligence" under the circumstances, as required by ERISA Section 404(a)(1)(B), 29 U.S.C. Section 1104 (a)(1)(B).

The complaint also alleges that several of the Fifth Third SEC filings, which petitioners chose to incorporate by reference into the Plan SPD, contained materially false and misleading statements concerning Fifth Third's activities in the subprime and related areas. The complaint alleges that petitioners' decision to incorporate those filings into the SPD for distribution to Plan participants, notwithstanding their knowledge of the false and misleading statements in those filings, also violated their fiduciary duties under ERISA. Pet. App. 17.

4. The district court dismissed the complaint. The court applied what has been called the "*Moench* presumption," or, in the Sixth Circuit, the "*Kuper* presumption," under which "the plan fiduciaries start with a presumption that their 'decision to remain invested in employer securities was reasonable.'" Pet. App. 37 (*quoting Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995)); *see Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Applying that presumption and analyzing the complaint, the district court held that it "must accept that Fifth Third embarked on an improvident and even perhaps disastrous foray into subprime lending, which in turn caused a substantial decline in the price of its common stock." Pet. App. 45. But the court held that, because the complaint did not in the court's view allege that Fifth Third was in a

"dire financial predicament," it was not "sufficient to establish a breach of fiduciary duty." Pet. App. 45.

In concluding that the complaint had not sufficiently alleged that Fifth Third faced a "dire situation," the court relied heavily on its conclusion that Fifth Third remained "viable," Pet. App. 44, and "was not in danger of collapsing," Pet. App. 43. In turn, it rested that conclusion in significant part on its views that Fifth Third's participation in the government's Capital Purchase Program—one of the government's TARP-related programs—showed the bank's viability, rather than, as the complaint alleged, the extreme distress in which Fifth Third found itself. Pet. App. 45. The court also decided to credit and give weight, on this motion to dismiss, to the fact that some large state pension funds continued to invest in Fifth Third stock during this period. The court accepted those evidentiary facts as proof of Fifth Third's viability, despite respondents' lack of opportunity to introduce evidence on those matters. Pet. App. 44.

The court also held that the complaint failed to state a claim when it alleged that petitioners breached their fiduciary duty by virtue of the misrepresentations in the Plan SPDs. The court noted that "the alleged misstatements and omissions to which the complaint refers . . . for the most part were made in corporate SEC filings," Pet. App. 47, which were "required under the federal securities laws and regulations," Pet. App. 50. The court did not address the fact that the SPD was a document required by ERISA, not the federal securities laws or regulations, and that respondents chose to incorporate the SEC filings into the ERISA-required SPD.

5. A unanimous panel of the court of appeals reversed. The court began by noting that it must de-

termine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Pet. App. 7 (*quoting Iqbal*, 556 U.S. at 678). The court held that no special presumption should apply in either direction in analyzing the complaint, because "it would be inconsistent to apply the *Kuper* presumption—which concerns questions of fact—at the pleading stage where the court must accept the well pled factual allegations of the complaint as true." Pet. App. 12. Nonetheless, the court held that, applying "the normal rules of notice pleading under Federal Rule of Civil Procedure 8," "the proper question at the Rule 12(b)(6) stage of the case is whether the Amended Complaint pleads 'facts to plausibly allege that a fiduciary has breached its duty to the plan.'" Pet. App. 13 (*quoting Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 596 (6th Cir. 2012)).

a. The court noted that the complaint "specifically enumerates and describes . . . warnings and public information of which [petitioners] were aware" that "should have led [petitioners] to investigate whether the Fifth Third Stock Fund was still a prudent investment given its own exposure to subprime lending." Pet. App. 14. In particular, the complaint alleges that, by July 19, 2007, petitioners "had knowledge of . . . 2007 warnings by industry watchdogs of subprime lending practices, the rise of foreclosures and delinquency rates in real estate loans, several published articles warning of the risks of loosening standards in order to invest in the subprime lending market, and the closure of several mortgage companies due to their investment in the subprime mortgage industry." Pet. App. 13-14. The complaint further alleges that petitioners "knew or should have known of the existence of these problems because of

their high-ranking positions within the company." Pet. App. 14.

In short, the complaint alleges "that Fifth Third engaged in lending practices that were equivalent to participation in the subprime lending market, that [petitioners] were aware of the risks of such investments . . . , and that such risks made Fifth Third Stock an imprudent investment." Pet. App. 15. Based on those allegations, the court concluded that the complaint "plausibly alleges a claim of breach of fiduciary duty and the requisite causal connection . . . regarding [petitioners'] failure to divest the Plan of Fifth Third Stock and remove that stock as an investment option." Pet. App. 15. In reaching that conclusion, the court criticized the district court for resolving disputed questions of fact in favor of petitioners—such as "Plaintiffs' alleged evidence of Fifth Third's participation in the TARP program and its effect on the reasonableness of holding Fifth Third Stock"—in ruling on the motion to dismiss in this case. Pet. App. 14-15 n.1.

b. The court of appeals also concluded that the complaint "plausibly alleges [petitioners] breached their fiduciary duties by intentionally incorporating Fifth Third's SEC filings into the Plan's SPD and thereby conveying misleading information to Plan participants." Pet. App. 22. The court noted that, although the district court had relied on the fact that petitioners were not acting as ERISA fiduciaries when the SEC filings were originally prepared, that is of no consequence. Indeed, respondents "concede[d] that the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 17. But the allegation in this case is that petitioners "violated their fiduciary duties when they

chose to incorporate SEC filings into ERISA Plan documents," not when they originally prepared documents for the SEC or filed them. Pet. App. 17.

The court explained that "ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD." Pet. App. 22. Therefore, because the complaint alleged that petitioners "exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock," the complaint stated a claim on which relief could be granted. Pet. App. 22. As the court noted, "[t]o hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach." Pet. App. 23.

6. The court of appeals denied petitioners' petition for rehearing en banc, with no judge having requested a vote on it. Pet. App. 56

ARGUMENT

There is no doubt that ERISA imposes a duty on plan fiduciaries to act with proper "care, skill, prudence, and diligence" under the circumstances. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Applying settled standards, the court of appeals held that the complaint in this case was sufficient to state a claim that petitioners violated that duty by making and holding imprudent investments in Fifth Third stock. That result is correct, and it does not conflict with any decision of any other court of appeals. The varying results in cases of this sort turn on their underlying facts, and an important fact in this case—

unlike in the cases that petitioners rely on—is that the Plan "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4a. In any event, the court of appeals' conclusion that the particular allegations of the complaint in this case are sufficient to state a claim would not warrant further review, especially in light of the absence of a more developed factual record. The Court has recently denied review in three cases presenting essentially the same question presented in this case, and the same result is warranted here.

The court of appeals also concluded that petitioners can be held responsible under ERISA for knowingly incorporating false statements into the ERISA-required Summary Plan Description that were originally made in SEC filings, just as they are responsible for any other statements that they know to be false and nonetheless choose to include in the SPD to influence decisions of Plan participants. That holding does not conflict with any decision of any other court of appeals. There is no support for petitioners' contention that, merely because the false statements were originally made in SEC filings, petitioners are immune from liability under ERISA for deciding to include them in the ERISA-required SPD.

I. FURTHER REVIEW IS NOT WARRANTED TO CONSIDER THE ADEQUACY OF THE INVESTMENT-BASED ALLEGATIONS IN THE COMPLAINT

Petitioners argue that the court of appeals' decision "conflicts with the decisions of other circuits holding that an ESOP fiduciary's decision to invest in em-

ployer stock is presumed reasonable at the pleading stage and only reviewed for an abuse of discretion." Pet. 12. This Court has recently denied certiorari in three cases presenting essentially the same question. *See Fisher v. JP Morgan Chase & Co.*, 133 S. Ct. 617 (2012); *Gearren v. McGraw-Hill Cos., Inc.*, 133 S. Ct. 476 (2012); *Gray v. Citigroup, Inc.*, 133 S. Ct. 475 (2012). The same result is warranted here. With respect to the key underlying issue, the circuits have uniformly held that there is a presumption of prudence that governs plan fiduciaries' conduct in this context, and the court of appeals reaffirmed that position here. *See* Pet. App. 10-11.

In any event, the court of appeals' decision was correct, there is no conflict in the circuits, and the evaluation of the particular complaint in this case to determine if it sufficiently states a claim under ERISA presents no question that warrants a grant of certiorari. Indeed, if there were a question regarding the standards of fiduciary liability under ERISA that warranted this Court's attention, it would be better considered on the more complete factual record that will be developed after the case is permitted to proceed in the lower courts.

A. There Is No Conflict In The Circuits Because Petitioners' Obligations Turn On the Particular Terms of the Plan In This Case

There is no conflict in the circuits, because varying results in this area in large measure turn on the varying duties of the fiduciaries, which in turn depend on the terms of the particular ERISA plan in each case. In each of the cases from other circuits cited by petitioners, the plan directed the fiduciaries to invest in employer stock, and the complaint alleged that the

fiduciaries violated their duties by following the plan's command. By contrast, in this case, the Plan gave petitioners full authority to cease investing in or divest the employer's stock, and the complaint alleges that they acted imprudently in failing to exercise that authority. Whatever may be the ERISA obligation of the constrained fiduciaries in the cases cited by petitioners from other circuits, the decisions in those cases do not control the outcome here, where the fiduciaries were under no such constraints.

1. The court of appeals was quite clear that the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates.

Pet. App. 4. That statement repeats an express allegation of the complaint, Complaint ¶ 47, which in turn is supported by the terms of the Plan's foundational document, which recites without qualification that "the Administrator shall change the investment funds if and when it deems it prudent to do so." Complaint ¶ 47 (quoting Trust Agreement, § 3.3(a)). On this motion to dismiss, the court thus had no choice but to conclude that the Plan did not charge petitioners with an obligation to invest in the employer's stock, as in the cases cited by petitioners. Instead, it charged them with an obligation to use their judgment prudently in deciding what investments to offer—including whether to continue to offer Fifth Third Stock Fund to participants and whether to divest the employer stock currently invested in the Fund.

a. Petitioners nonetheless appear to dispute that conclusion, asserting that "[t]he Plan document *required* that one investment option be the Fifth Third Stock Fund, which the Plan defined as an ESOP *required* to invest primarily in qualifying employer securities." Pet. 4 (emphasis added). They did not make that argument to the court of appeals, and any such argument would have been futile in light of the allegations of the Complaint and the terms of the Plan cited above. Moreover, petitioner's disagreement with the court of appeals about the meaning of the particular terms in the Plan document in this case would not in any event warrant this Court's attention.

b. Petitioners mistakenly cite the district court's opinion in support of their assertion that they were "required" to invest in Fifth Third stock. Pet. 4 (citing Pet. App. 30, 35-36). Even if the district court had reached that conclusion, it would be of no consequence, because this Court should not grant review in order to resolve claims that a court of appeals disagreed with a decision of one of its own district courts on the interpretation of a particular legal document. But there was in fact no disagreement between the court of appeals and the district court on this point.

The district court did recite the undisputed fact that "one fund [offered to participants] invests entirely in Fifth Third common stock" with some exceptions. Pet. App. 30. But, although it is undoubtedly true that the Fund did "invest[] entirely in" employer stock, the court did not state or imply that petitioners were *required* to offer the Fund to participants. To the contrary, in addressing whether the Fifth Third Stock Fund is an Employer Stock-

Ownership Plan (ESOP)—a fact not at issue on this petition—the district court noted that respondents alleged that "the Plan *allows* the plan administrator to discontinue or change investment options when it becomes prudent to do so." Pet. App. 36 (emphasis added). The district court did not reject that allegation, and on this motion to dismiss it could not have done so. Instead, the court assumed the allegation to be correct, and then merely commented that the allegation does not alter the conclusion that "the stock fund is an ESOP because the principal inquiry [as to whether a fund is an ESOP] is not whether the plan administrators have authority to discontinue the fund," but rather whether it in fact invests primarily in employer securities. Pet. App. 36.

2. The fact that petitioners had "the ability . . . to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates," Pet. App. 4, makes the legal analysis in this case different from that in each of the allegedly conflicting cases cited by petitioners and refutes petitioners' claim that there is a conflict in the circuits.

a. Petitioner argues that the decision in this case conflicts with *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012), *Edgar v. Avaya*, 503 F.3d 340 (3d Cir. 2007), and *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012). *See* Pet. 13-14. There is no conflict.

Initially, the Third Circuit's decision that the complaint failed to state a claim in *Edgar v. Avaya* was based on the fact that the plaintiff there had "pleaded himself out of court" by pleading facts sufficient to establish that he was not entitled to relief. In particular, because the complaint in Edgar alleged only that the company stock had dropped slightly as

a result of "corporate developments" but had then fully recovered, the plaintiff had not identified any imprudence. See 503 F.3d at 349 & n. 14 ("[A] duty of prudence claim that is on its face inadequate as a matter of law obviates the need for discovery.").

The Third Circuit's holding that the *Edgar* plaintiff essentially pleaded himself out of court did not establish any general rule that complaints alleging an ERISA fiduciary breach of this kind must overcome an exceptionally high hurdle in order to state a claim. The decision in *Edgar* does not conflict with the court of appeals' determination in this case that, given the factually supported allegations that petitioners knew that Fifth Third stock was artificially inflated and bound to fall dramatically but continued to hold it for the Plan, the complaint here stated a claim for relief.

b. In any event, neither *Edgar* nor the other cases cited by petitioners addressed a plan like the one here, in which plan fiduciaries had full authority to discontinue investment in, or entirely to divest, the company stock.

In *Citigroup*, the plans "*mandate[d]* that the [employer stock] Fund be included as an investment option." 662 F.3d at 133 (emphasis added). The Second Circuit relied on the fact that the plans gave the "fiduciary . . . little discretion to alter the composition of investments" in the employer stock fund. *Id.* at 139. No such fact was present here.

In *Edgar*, the plans provided that the investment options offered to participants "*shall include* the [employer] Stock Fund, which shall be invested primarily in shares of [employer's] common stock, with a small portion in cash and other liquid investments." 503 F.3d at 343 (emphasis added). The alle-

gations in *Edgar* would have "require[d] defendants to disobey the terms of the Plans by not offering [the employer stock fund] as an investment option, or by divesting the Plans of [employer stock]," thus "risk[ing] liability for having failed to follow the terms of the Plans." *Id.* at 348-349. The allegations in this case would not have required petitioners to disobey any terms of the Plan here, but instead sought to hold them to the obligations the Plan itself (and ERISA) impose.

In *Lanfear*, the Eleventh Circuit explained that "[t]he language of the Plan *requires* that one of the available investment funds be a 'Company Stock Fund,'" which is "invested primarily in shares of [the employer's] stock." 679 F.3d at 1271-1272 (emphasis added). While the fiduciaries were thus not required to invest the fund "exclusively" in company stock, *id.* at 1277, "[t]he limitation on their discretion was the Plan's requirement that the fund's *primary* investment be [employer] stock." *Id.* at 1277 (emphasis added). Thus, the case involved a challenge to the "fiduciary's decision to continue to invest or to remain invested in company stock *in obedience to the plan's directions*." *Id.* at 1281 (emphasis added); *see id.* at 1280 ("continued adherence to the ESOP's direction" to invest in company stock). The Plan in this case did not subject petitioners to any such directions.

c. Petitioners also assert that the Fifth and Ninth Circuits require plaintiffs to surmount a higher bar in order to plead a claim that ERISA fiduciaries breached their duty by imprudently holding and continuing to purchase employer stock. See Pet. 18. But both of the cases cited by petitioners—*Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), and *Quan v. Computer Scis. Corp.*, 623 F.3d 870

(9th Cir. 2010)—simply adopted the same *Moench* presumption that petitioners concede the Sixth Circuit too adopted in *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). *See* Pet. 13. Indeed, the court of appeals here *reaffirmed* its allegiance to that standard: "A fiduciary's decision to remain invested in employer securities is presumed to be reasonable," and the Sixth Circuit has "adopted an abuse of discretion standard of review for an ESOP fiduciary's decision to invest in employer securities, the so-called *Kuper* or *Moench* presumption." Pet. App. 10-11. Because both *Kirschbaum* and *Quan* arose on review of a grant of summary judgment, neither case analyzed or discussed what is necessary to state a claim of fiduciary breach on a motion to dismiss. Accordingly, neither decision conflicts with the Sixth Circuit's decision in this case.

Moreover, even if they had arisen on a motion to dismiss, both *Kirschbaum* and *Quan* would not conflict with the decision here, because *Kirschbaum* and *Quan* also involved fiduciary obligations under plans like those at issue in *Citigroup, Edgar*, and *Lanfear*, in which the fiduciaries were *required* to offer an employer stock fund to participants. *See Kirschbaum*, 526 F.3d at 250 ("It is clear that the Plan required the Fund to be invested almost exclusively in [employer] common stock."); *id.* at 253 (noting that "the Plan's requirements to invest in [employer] stock are mandatory"); *Quan*, 623 F.3d at 875 ("Under the Plan's governing document, the [employer] Stock Fund was a mandatory investment offering."). The fiduciary's obligations under such a plan could be different from those in a plan like the one here, in which the fiduciaries were charged only with exercising prudence in deciding on investment options.

3. Because petitioners had much more responsibility merely to follow the dictates of prudence in deciding whether to divest or continue to invest in employer stock than the fiduciaries in each of the cases cited by petitioners, it is natural that the results in those cases would differ. Indeed, the courts are in general agreement that the fiduciary's duty to invest in employer stock is critical. As the Ninth Circuit in *Quan* explained, "[a] guiding principle . . . is that the burden to rebut the presumption [of prudence] varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock." 623 F.3d at 883. *Accord Kirschbaum*, 526 F.3d at 255 & n.9 (noting that "a greater degree of deference, and hence a lesser degree of judicial scrutiny, would be appropriate to" plans that "afford[] no discretion to enter into other investments"); *Citigroup*, 662 F.3d at 138 ("judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest" in employer stock); *Moench*, 62 F.3d at 571 (noting different standards applicable depending on degree to which fiduciary is "required to invest in employer securities").

That difference between fiduciaries who are directed to invest exclusively or primarily in employer securities and those who have full authority not to do so is entirely consistent with the abuse-of-discretion standard that petitioners urge. As the Court explained in *Varity Corp. v. Howe*, "the primary function of the [ERISA] fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust document or the legal regime." 516 U.S. 489, 504 (1996) (emphasis in original). Where, as in this case, the Plan "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets

invested in the Fifth Third Stock Fund, as prudence dictates," the courts uniformly accept that an abuse-of-discretion standard subjects the fiduciary's decisions to more searching judicial scrutiny. On the other hand, where, as in the cases cited by petitioners, the fiduciary is *required* to offer and invest exclusively or primarily in employer stock, the courts cited by petitioners reason that more deference and less judicial scrutiny of the fiduciary's decision to obey the plan terms is appropriate.

B. In Any Event, The Sixth Circuit Applied The Standard Urged By Petitioners

Petitioners allege that further review is warranted because the court of appeals departed from the decisions of other circuits to apply the presumption of prudence at the pleading stage of a case. If that were true, there would still be no conflict, because, as explained above, the Plan fiduciaries in this case had substantially more authority—and, accordingly, were subject to substantially more rigorous judicial review—than the fiduciaries in each of the cited cases. But in any event, the result reached by the court of appeals here is consistent with the decisions of each of those courts.

1. The court of appeals in this case did state that it would not apply the *Moench* presumption at the motion to dismiss stage. Pet. App. 13. But it nonetheless required respondents to plead "facts to plausibly allege that a fiduciary has breached its duty to the plan" and "that an adequate investigation would have revealed to a reasonable fiduciary that the investment [in Fifth Third Stock] was improvident." Pet. App. 13 (*quoting Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 596 (6th Cir.), cert. denied,

133 S. Ct. 758 (2012)). It reviewed the allegations of the complaint, including the allegations that "Fifth Third switched from being a conservative lender to a subprime lender," that "its loan portfolio became increasingly at risk due to defaults," and that "it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures." Pet. App. 4-5. Those factors "caused the price of Fifth Third Stock to be artificially inflated before plummeting." Pet. App. 5.

As the court of appeals concluded, it would surely be an abuse of discretion under ERISA (or any other regime) for a prudent fiduciary to knowingly continue to invest funds in a highly risky investment whose risk factors had not been publicly disclosed and whose stock was therefore being sold at prices that were artificially inflated and ultimately bound to fall very substantially. The court of appeals' conclusion is indistinguishable from what petitioners allege a court should require of a complaint in a case like this: that the complaint "plausibly allege that the ESOP fiduciary abused its discretion in order to state an ERISA breach of fiduciary duty claim." Pet. 11.

2. Although verbal formulations may differ, there is no reason to believe that, even disregarding the Plan's lack of limits on petitioners' decisions on investments in Fifth Third stock, any other court of appeals would have reached a different conclusion in this case. The Second and Eleventh Circuits have required a complaint to allege that the plan fiduciaries knew they faced a "dire situation" before being required to divest the company stock. *See Citigroup*, 662 F.3d at 140; *Lanfear*, 679 F.3d at 1282. But the complaint in this case did in effect allege that Fifth

Third faced a "dire situation," for the reasons outlined by the court of appeals. Pet. App. 4-5, 13-15.

The district court reached the contrary conclusion only by misconceiving the inquiry at the motion to dismiss stage of the case. It is settled law that, on a motion to dismiss, the court "must accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and "take them in the light most favorable to the [plaintiff]," *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Nonetheless, the district court relied on evidence that some completely unrelated pension funds continued to invest in Fifth Third throughout the relevant period as a reason to conclude that respondents should not have the opportunity to prove their allegations that petitioners acted imprudently. Pet. App. 44a-45a. The court did so despite the fact that respondents had no chance to offer proof on how the risk profiles of the cited funds differed from the Plan at issue, why the unrelated state pension funds were making their investment decisions, or whether and how many other pension funds had concluded that they must *avoid* Fifth Third stock. Obviously, this kind of evaluation of a snippet of evidence at the motion to dismiss stage—*and construing it as establishing the defendant's case as a matter of law*—is improper.

Similarly, the complaint alleges that Fifth Third's participation in a government "bailout" program—the Capital Purchase Program—was a sign of deep financial stress. That was certainly a reasonable inference, and it is therefore binding at least unless and until it is disproven at a later stage of the litigation. The district court, however, chose to draw the opposite inference that Fifth Third's "participation in the [Program] is actually a sign of its viability

and another indication that [petitioners'] decision to remain invested in Fifth Third stock was not imprudent." Pet. App. 45. The court of appeals correctly held that "the district court erred to the extent it weighed [respondents'] alleged evidence of Fifth Third's participation in the . . . program and its effect on the reasonableness of holding Fifth Third Stock" at this stage of the litigation. Pet. App. 14-15 n.1.

In short, the complaint alleges facts in this case that, if evaluated under the standards applicable to a motion to dismiss, are sufficient to state a claim of breach of fiduciary duty under the standards of any circuit. This Court's review is unwarranted.

3. Petitioners' arguments that they should not be held liable can be addressed at a later stage of this case, after at least some development of the facts. But it is appropriate to correct a few errors.

a. Petitioners allege that the Sixth Circuit's decision will inappropriately spur frivolous litigation "every time the employer's stock price fluctuates." Pet. 12. That is not true. A drop in stock price is neither necessary nor sufficient for a showing of an ERISA fiduciary breach. Stock prices may drop for a wide variety of reasons that have nothing to do with a fiduciary breach, including changes in the supply and demand for a firm's products, general business conditions, the failure of a new technology or product to work as hoped, and many other factors. By the same token, although there may be no damages, a fiduciary breach can occur without a drop in stock price, when, for example, fortuities in demand for a firm's products lead to an increased stock price despite the presence of even large, undisclosed risks that were known to plan fiduciaries and would otherwise have led to huge losses. The fiduciary's duty is

to act with "care, skill, prudence, and diligence" under the circumstances, ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), not to guarantee a stock price or a profit.

The gravamen of the complaint here is not that Fifth Third's stock price fluctuated, but that petitioners, who were given broad authority to choose Plan investments, invested *imprudently* in Fifth Third stock despite their awareness of specific and extraordinary risks that were not disclosed to the market and that made the stock subject to an inevitable and devastating decline. Respondents pleaded specific facts that, under *Iqbal* made such a claim plausible, and they were therefore entitled to proceed to prove that claim. By contrast, petitioners would exclude all such claims, thus leaving fiduciaries entirely free to gamble Plan funds as they wish, to the potential benefit of the employer and at the risk of devastating losses to Plan participants—all in contravention of the ERISA-enforced employment bargain they made to help employees save for their retirement.

b. Petitioners acknowledge that "the Sixth Circuit correctly noted that the *general* standards of prudence and loyalty apply to ESOP fiduciaries." Pet. 23. But they err when they charge that the court "disregarded the ESOP-*specific* exemptions included in ERISA." Pet. 23. One such arguable "exemption" or limitation could be for fiduciaries who own employer stock because they are required to do so by the terms of the plan (although even then, the terms of ERISA itself trump the plan's terms). *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). As explained above, the terms of the Plan here do *not* require petitioners to invest in Fifth Third stock, and

they accordingly cannot take advantage of this sort of "exemption."

The only other exemption on which petitioners rely is the statutory exemption from the requirement to diversify investments:

> In the case of an eligible individual account plan . . . , the diversification requirement of [29 U.S.C. 1104(a)(1)(B)] and the prudence requirement (only to the extent that it requires diversification) is not violated by acquisition or holding of . . . qualifying employer securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2). That provision makes clear that fiduciaries may invest in qualified employer stock without fearing liability for failure to diversify, and the complaint in this case did not charge or rely on petitioners' failure to diversify. But Section 404(a)(2) also makes clear that Congress intended no *further* diminution of ERISA's fiduciary duties in order to encourage employee stock ownership. In carefully written and unmistakable terms, Congress relaxed ERISA's prudence requirement "*only to the extent that it requires diversification.*" ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (emphasis added). Insofar as acquiring or holding company stock is imprudent for any reason *other than the requirement to diversify*—such as when its price is known to be artificially inflated and enormously overvalued—ERISA unmistakably subjects fiduciaries to its unqualified "care, skill, prudence, and diligence" requirement.

c. Petitioners also argue that Congress intended to permit imprudent investment in ESOPs, citing an uncodified provision of the Tax Reform Act of 1976 stating that Congress "is deeply concerned" by "regu-

lations and rulings" that "treat [ESOPs] as conventional retirement plans." Pet. 23 (*citing* Tax Reform Act of 1972, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590). That statement of "concern" does not purport to, was not intended to, and does not amend or dilute any provision of ERISA. It certainly does not leave fiduciaries of ESOPs free to act imprudently, just as it does not give them freedom to defraud a plan, engage in self-dealing, fail to pay claims or follow the terms of a plan, or otherwise contravene ERISA's express requirements. When Congress wanted to make exceptions to ERISA's prudence or other requirements, it did so expressly, as the diversification exception in Section 404(a)(2) discussed above makes clear.

In any event, Congress's "concern" was directed at "proposed regulations issued by both the Department of the Treasury and the Department of Labor on July 30, 1976" that "may make it virtually impossible for all ESOPs, and especially leveraged ESOPs, to be established and function effectively." S. Rep. No. 1236, 94th Cong., 2d Sess. 539 (1976). The conference report itemizes the specific parts of the proposed regulations with which Congress was concerned, which generally have to do with issues such as loans to ESOPs, options on ESOP stock, voting rights and dividend restrictions applicable to ESOP stock, etc. None has anything whatsoever to do with ERISA's general fiduciary duties or the issues in this case.

II. FURTHER REVIEW OF PETITIONERS' CLAIM THAT THEY ARE ABSOLUTELY IMMUNE FOR MAKING FALSE STATEMENTS BECAUSE THEY CHOSE TO INCORPORATE THOSE STATEMENTS FROM SEC FILINGS IS UNWARRANTED

As this Court held in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA," ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). 516 U.S. at 506 (*quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)). It appears to be petitioners' position, however, that, because they incorporated false statements from SEC filings into the SPD rather than paraphrasing or repeating the false statements verbatim, they cannot be held liable. Nothing in ERISA or elsewhere in the law grants them such absolute immunity. The court of appeals correctly rejected their extraordinary claim, and its decision does not conflict with that of any other court of appeals.

A. The Court of Appeals Correctly Held That A Fiduciary Violates ERISA Obligations By Knowingly Incorporating By Reference A False Statement From an SEC Filing Into A Summary Plan Description

1. ERISA requires fiduciaries to act "solely in the interest of participants and beneficiaries," ERISA § 404(a), 29 U.S.C. § 1104(a), and with "care, skill, prudence and diligence," ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Petitioners do not dispute that making knowingly false or misleading statements to

ERISA participants in an effort to encourage them to make a decision with respect to their ERISA benefits or investments is inconsistent with those duties and is actionable. See *Varity Corp. v. Howe*, 516 U.S. at 506; see also Pet. App. 16 (*citing Varity Corp.*).

As the court of appeals recognized, "[t]he threshold question in all cases charging breach of ERISA fiduciary duty is whether the defendant was 'acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.'" Pet. App. 16 (*quoting Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). For that reason, the court also recognized—and respondents acknowledged—that "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA" and cannot themselves violate any duty under ERISA. Pet. App. 17.

In this case, the complaint does not base any claim on whatever role petitioners may have had in preparing, signing, and filing SEC documents. It claims that petitioners breached their fiduciary duty when they knowingly "chose to provide Plan participants with selected information—alleged to include material misrepresentations about Fifth Third and its Stock—by incorporating only specifically enumerated SEC filings and specific future filings into the SPD." Pet. App. 18. Indeed, petitioners themselves explained in the SPD that the information they were incorporating from SEC documents was material. As the SPD stated, petitioners were "disclos[ing] important information to you by referring you to" documents filed with the SEC, and "[t]he information incorporated by reference is an important part of [the SPD]." Pet. App. 18. They also urged that participants "should rely" on that information: "in case of a conflict or in-

consistency between information contained in this booklet and information incorporated by reference into this booklet, you *should rely* on the information that was filed later." Pet. App. 18 (emphasis added).

As the court of appeals explained, "ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD." Pet. App. 22. While petitioners were not responsible for preparing or filing the SEC documents, they were plainly acting as ERISA fiduciaries and "exercised discretion in choosing to incorporate the [SEC] filings into the SPD . . . as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock." Pet. App. 22. The conclusion is ineluctable that, if petitioners knew that the incorporated statements were false or misleading, their decision to add them to the SPD was a breach of their duty under ERISA.

2. Petitioners repeatedly argue that "none of the alleged misstatements in the SEC filings were made by an ERISA fiduciary or connected to fiduciary statements about the future of plan benefits," Pet. 27, that the court's holding "completely ignores the context in which the challenged statements were made," Pet. 27, and that "[n]o ERISA fiduciary made these alleged misleading statements or took action that is 'subject to complaint.'" Pet. 28. All of those statements could be true if petitioners had not incorporated the SEC filings into the SPD. But they did choose to incorporate them, and that choice is the basis of the complaint in this case.

Like the district court, petitioners repeatedly confuse the act of writing or filing the documents with the SEC (which were not ERISA fiduciary acts) with

the act of incorporating the documents by reference into the SPD while emphasizing to participants that they were "important" and that "you should rely on" them (which were ERISA fiduciary acts). Pet. App. 18. It could not possibly make a difference that the material was incorporated by reference from SEC filings, rather than paraphrased or reprinted verbatim in the SPD. As the court of appeals explained, "[t]o hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach." Pet. App. 23. There is no reasonable construction of ERISA that would lead to that result.

Petitioners argue that "[t]he Sixth Circuit's opinion will require plan fiduciaries to investigate the truth of every single statement made in SEC filings that is incorporated by reference into plan documents," Pet. 33, and they refer to "strict liability" that will be imposed on ERISA fiduciaries who incorporate false or misleading statements into ERISA documents. Pet. 26, 29. ERISA fiduciaries have the duty to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). That is not strict liability. It does, however, require that fiduciaries act with appropriate care and diligence. Knowingly incorporating "important" false statements into an ERISA SPD that the participants "should rely on" is inconsistent with that duty, and it is actionable under ERISA.

B. There is No Conflict in the Circuits

Petitioners claim that the court of appeals' holding that they are not absolutely immune from liability for knowingly incorporating false statements from SEC filings into the SPD conflicts with decisions of the Fifth, Second, and Eleventh Circuits. There is no conflict.

1. In *Kirschbaum*, the Fifth Circuit held that an individual who was an ERISA fiduciary and who incorporated SEC filings into the plan *prospectus* was merely "discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary." 526 F.3d at 257. But *Kirschbaum* did not involve an ERISA-required SPD. As the courts of appeals both here and in *Kirschbaum* explained, a plan prospectus may be required by the securities laws, not ERISA, and accordingly the individual's conduct in incorporating material into a plan prospectus may not be an ERISA fiduciary function. Pet. App. 20; *see* 526 F.3d at 257. Indeed, in *Kirschbaum* itself, the Fifth Circuit found "easily distinguishable"—and did not disapprove of—a district court case in which the court *refused* to dismiss a complaint alleging that an ERISA fiduciary "had used the . . . Prospectus as the Summary Plan Description." 526 F.3d at 257 (*citing In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 869 (S.D. Tex. 2004)). The court noted that the plaintiff in *Kirschbaum* "makes no such claim, and the record reveals that [the fiduciaries] issued a separate document to serve as the SPD." *Ibid.* As the court of appeals concluded, "*Kirschbaum* is, on its face, inapplicable." Pet. App. 21.

For the same reason, the court of appeals' decision here is entirely consistent with *Lanfear*. In that case,

the defendants "took . . . inaccurate statements in the Form 10-K annual reports and in the Form 10-Q quarterly reports and put them into the Form S-8s and into the stock prospectuses" of the ERISA plan. 679 F.3d at 1283. The Eleventh Circuit held that "[i]t is securities law, not ERISA, that requires registration of securities," including filing the prospectuses and the 10-Q and S-8 forms. *Ibid.* Agreeing with *Kirschbaum*, the court held that "[w]hen the defendants . . . filed the Form S-8s and created and distributed the stock *prospectuses*, they were acting in their corporate capacity and not in their capacity as ERISA fiduciaries." *Id.* at 1284 (emphasis added). The Eleventh Circuit was not asked to, and did not, reach the conclusion that knowingly incorporating false and misleading material into an *SPD* that is required by ERISA is anything but an ERISA fiduciary function for which the fiduciary may be liable.

2. Nor does the decision in this case conflict with the Second Circuit's decision in *Gearren v. The McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011). In *Gearren*, the SPD did incorporate SEC filings containing allegedly false and misleading statements. *Id.* at 610-611. Petitioners are correct that the Second Circuit held that "defendants who *signed or prepared the SEC filings* were acting in a corporate, rather than a fiduciary, capacity when they did so," and the court held that those defendants accordingly "may not be held liable under ERISA for misstatements contained in the SEC filings." Pet. 30-31 (emphasis added) (*quoting Gearren*, 660 F.3d at 611). The Sixth Circuit in this case reached exactly the same conclusion: "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 17.

Gearren also addressed a claim similar to the one in this case that, "because the Plans' SPDs incorporated the SEC filings, the SPDs contained the same misstatements as the SEC filings." 660 F.3d at 611. Nothing in the Second Circuit's opinion casts any doubt on that theory of liability. Instead, the Second Circuit held that the complaint filed in that case had not "provided any specific allegations as to how [the fiduciary] knew or should have known . . . that . . . the SEC filings contained misstatements or omissions." *Ibid.* Because there was no allegation of the fiduciary's knowledge—and not because the fiduciary had an immunity from liability for knowingly incorporating false statements into an ERISA SPD—the court held that the claim was properly dismissed.

In this case, by contrast, the court of appeals correctly concluded that the complaint did adequately allege that petitioners knew the statements were false and misleading. That conclusion was correct, and in any event it is a conclusion about the specific facts alleged in the complaint here that would not warrant this Court's review. There is no conflict between the decision in this case and *Gearren*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THOMAS J. MCKENNA
GAINEY & MCKENNA
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

RONALD R. PARRY
PARRY DEERING FUTSCHER
& SPARKS, PSC
411 Garrard Street
Covington, KY 41012
(859) 291-9000

ROBERT M. SMITH
DREW & WARD CO., LPA
1 West Fourth Street
Suite 2400
Cincinnatti, OH 45202
(513) 621-8210

ANDREW L. ZIVITZ
Counsel of Record
JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

Counsel for Respondents

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SUPPLEMENTAL BRIEF

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Petitioners,

v.

JOHN DUDENHOEFFER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY, MCKENNA & EGLESTON
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

ANDREW L. ZIVITZ
Counsel of Record
JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Although the government persuasively explains why the *Moench* presumption is inconsistent with the text and purposes of ERISA, the government pays insufficient attention to a crucial difference between this case and the other allegedly conflicting cases. The question on which the courts of appeals are divided concerns the duty of prudence applicable to fiduciaries of an ERISA plan *who are required by the terms of the plan to invest in company stock*. By contrast, this case concerns the duty of prudence applicable to fiduciaries of an ERISA plan *where the terms of the plan "do[] not mandate"* investment in the company stock and *"do[] not limit"* their ability to "remove ... or divest" company stock. Pet. App. 4 (emphasis added).

There are only a relatively small number of cases involving such unconstrained fiduciaries. Moreover, there is no real conflict regarding their duty of prudence. If the Court were to grant certiorari, it would likely reach the same conclusion with regard to the duty of unconstrained fiduciaries as did the court below and as have all other courts that have faced the question. More important, the Court would likely fail to reach the question of the duty of prudence owed by constrained fiduciaries on which the circuits are divided, and its resolution of this case would thus likely provide little guidance for most future cases in this area. The petition for certiorari should be denied.

I. OTHER COURTS APPLY A SIMILAR STANDARD TO UNCONSTRAINED FIDUCIAIRIES

The government does not dispute that most of the cases discussing the duty of ERISA fiduciaries investing in company stock have involved plans that required or at least significantly constrained fiduciaries to invest in company stock. *See* BIO 15-18. Nor does the government dispute that at least the Second, Third, Fifth, and Ninth Circuits expressly agree that "[a] guiding principle ... is that the burden to rebut the presumption [of prudence] varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock." *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 883 (9th Cir. 2010). *See* BIO 19 (citing cases).[1] Where, as here, the

[1] The Third Circuit itself, where the *Moench* presumption originated, has made clear that the presumption is "inapposite" where the fiduciaries were "'simply permitted to make ... investments' in 'employer securities.'" *In re Schering-Plough*

plan "does not limit" the fiduciary's discretion to divest or cease investing in company stock, Pet. App. 4, these courts would all permit a complaint like the one here to go forward.[2] They would all agree that the so-called *Moench* presumption, if it applies at all in this situation, would have little or no weight.

Although the government apparently agrees that most of the decisions have held that the fiduciary's duty turns in part on the obligations the plan imposes on him, the government does argue that "*not all* of the precedents from other circuits relied on mandatory plan terms to apply the presumption of prudence." Gov't Br. 17 (emphasis added). But *Kopp v. Klein*, 722 F.3d 327, 336 (5th Cir. 2013), pet. for cert. filed, Nov. 7, 2013 (No. 13-1578),[3] is the *only* decision that has suggested that the standards applicable to fiduciaries in this situation have nothing to do with whether the fiduciary is constrained to invest in employer stock. In *Kopp*, the district court had found that "the Plan *mandated* the [fiduciaries] invest in [company] stock." *Id.* at 335 (emphasis added). If the district court were correct, *Kopp* is thus just another mandated-fiduciary case.

It is true that there was a challenge to the district court's conclusion on appeal, and the court of appeals declined to resolve that challenge, stating that it

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Corp. ERISA Litig., 420 F.3d 231, 238 n.5 (3d Cir. 2005) (quoting *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)).

[2] The court of appeals held that "the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4.

[3] One of the attorneys representing respondents in this case is also representing petitioners in *Kopp*.

would apply the *Moench* presumption "regardless of whether the [fiduciaries] had discretion to cease permitting new Fund investments in [company] stock or liquidate Fund investments in [company] stock." *Klein*, 722 F.3d at 336. But if taken at face value, that statement creates a clear intra-circuit split with the Fifth Circuit's prior conclusion that "a greater degree of deference, and hence a lesser degree of judicial scrutiny, would be appropriate to" plans that "afford[] no discretion to enter into other investments." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 255 & n.9 (5th Cir. 2008). Especially in light of the fact that *Kopp* gave no explanation whatever for its statement and made no effort to reconcile it with *Kirschbaum*, that statement alone cannot be taken as a firm indication that the Fifth Circuit would disagree with the Sixth Circuit's result in this case.

It is also true, as the government states, that other cases have examined plans that provide the fiduciary with "*some* discretion" in divesting or ceasing to invest in company stock. Gov't Br. 17 (quoting *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1277, 1282 (11th Cir. 2012)) (emphasis added). The terms of plans differ, and the Second and Ninth Circuits' cases cited by the government (at Br. 17) offered the fiduciaries only *some* discretion to divest or cease to invest in company stock. None of the cases cited by the government, however, involved a plan that "does not limit" the fiduciary's discretion to cease investing or to divest the employer stock. Pet. App. 4. The cases that did involve such unconstrained fiduciaries in the Second and Ninth Circuits have uniformly agreed with the court of appeals here and have permitted similar cases to proceed. *See Harris v. Amgen, Inc.*, 2013 WL 5737307, at *10 (9th Cir. Oct. 23, 2013); *Taveras v. UBS AG*, 708 F.3d 436, 444 (2d Cir. 2013).

Taveras is illustrative. In that case, which involved two plans, the court allowed complaints against *un*constrained fiduciaries of one plan to go forward, 708 F.3d at 444, while it affirmed dismissal of the complaint against the constrained fiduciaries of another plan. 708 F.3d at 446. The government notes (Br. 18) that in *Taveras*, the court stated that the constrained fiduciaries in the second plan had "the ability to remove the company's fund from those funds available to plan investors." 708 F.3d at 444. But, contrary to the government's contention, that did not put those fiduciaries in the same position as respondents here. The Second Circuit in *Taveras* did *not* conclude, as the Sixth Circuit did here, that the second plan in *Taveras* "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4.

Insofar as there is a conflict in the circuits on the fiduciary duties owed by constrained fiduciaries, this is the wrong case to resolve it. The fiduciaries here were governed both by ERISA's mandate to exercise prudence, as discussed by the government (Br. 9-13), and by the precisely parallel plan mandate to act "as prudence dictates" in deciding whether to cease investing in or divest company stock. Pet. App. 4. Because both mandates require exactly the same conduct, the courts of appeals would agree on the disposition of this case, which does not at all turn on the proper disposition of a case in which it is arguable that the plan's terms attempt to require conduct *different* from that required by ERISA's prudence standard. This Court would likely agree that the ERISA prudence standard is directly applicable in this situation, without having the opportunity to consider the question—on which there is significant

disagreement—whether *constrained* fiduciaries may act less prudently than the ordinary prudence standard of 29 U.S.C. 1104(a)(1)(B) allows.

II. THE TERMS OF THE PLAN HERE SUPPORT THE SIXTH CIRCUIT'S CONCLUSION

The government (Br. 18) states that "the plain terms of the Plan [in this case] mirror the terms of plans that other courts of appeals have determined ... 'provide only limited discretion'" to fiduciaries. Here, however, the court of appeals was quite clear that the plan terms "do[] not limit" the fiduciary's discretion to cease investing in or divest employer stock. Pet. App. 4a. Nor did the district court here come to any contrary conclusion. *See* BIO 14-15. Nor did petitioners argue either to the court of appeals or in the petition itself that the plan limited the fidicuaries' discretion in this regard. Petitioners did belatedly assert in their Reply Brief (at 4) that "there is no basis to distinguish" the terms of the plan here from the terms of plans in conflicting cases. But it is too late in the day to re-examine the particular terms of the plan here to determine whether the court of appeals correctly construed them, and doing so would surely not be a sound use of this Court's resources. In any event, the court of appeals' conclusion was correct.

1. The government and petitioners both cite provisions of the plan that state that company stock "shall be an investment option" and that the fiduciaries "shall direct [the company] to make available at least three investment funds in addition to the Fifth Third Fund." Gov't Br. 18; Reply Br. 5. It is not surprising that snippets of plan documents in one case, taken out of context, may appear similar to snippets of plan documents in another case. Any such

similarity has little to do with the meaning or interpretation of the documents as a whole, which must take into account *other* provisions, which neither petitioners nor the government bother to quote.

In particular, if review of the court of appeals' conclusion about the particular plan provisions at issue in this case were thought to be of sufficient importance to warrant this Court's attention, the plan here includes several provisions that establish the correctness of the court of appeals' result. Plans in other cases, such as the *Taveras* constrained-fiduciaries plan on which petitioners rely (at Reply Br. 7-8), provide that the fiduciaries "shall invest and reinvest all amounts in each Participant's Accounts ... from among the Investment Funds made available by the Investment Committee ... one of which *shall* be the [company] Common Stock Fund." 708 F.3d at 443-44. The plan here provides that "the Fifth Third Stock Fund ... shall be an investment option," Reply Br. App. 45, but it immediately follows that with the admonition:

> The Administrator shall have the duty of monitoring such investment funds to determine the continued prudence of offering such funds; and the Administrator *shall* change the investment funds available *if and when it deems it prudent to do so*.

Reply Br. App. 45 (emphasis added). Thus, although company stock had to be an initial offering of the plan here as in other cases, the fiduciaries here were under a mandate that they "shall" terminate that or any other investment if and when prudence dictates.

Furthermore, the plan in *Taveras* provided that its "purpose" is to "attract and retain qualified

individuals by providing them with an opportunity to accumulate assets for their retirement *and to acquire [company] stock*." 708 F.3d at 443 (emphasis added). The plan here has no such provision. To the contrary, the plan here was "established for the purpose of holding the Plan Assets and for the *exclusive benefit* of Participants and their beneficiaries." Reply Br. App. 2, 37; *see also id.* at 2, 37 ("It shall be impossible, by any means, ... for any part of the Plan Assets to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants and their beneficiaries."). A fiduciary of a plan whose purpose is to hold company stock may believe that he may not cease investing in or divest the company stock (although ERISA itself nonetheless requires him to act prudently). But a fiduciary of a plan for whom it is "impossible, by any means" to use plan assets for purposes other than the "exclusive benefit" of the plan participants is under no such arguable constraint.

This Court should not grant review in this case, premised upon the proposition that the court of appeals misinterpreted the particular terms of the plan here, based on arguments that petitioners could and should have made before that court and, if they believed it warranted, in their petition for certiorari. In the cases cited by the government and petitioners, the courts below made clear findings that the fiduciaries were constrained. If further review of the issue of the duties of constrained fiduciaries is warranted, the Court should undertake such review in a case in which the Court can rely on findings that the fiduciaries were constrained and then consider the legal significance of such findings, if any, for the duty of prudence under ERISA Section 1104(a)(1)(B). The Court should not do so in a case, like this one, in which the court below found, the record establishes, and

petitioners did not contest until their reply brief in this Court, that the fiduciaries were unconstrained.

2. The government suggests that, if the Court grants further review here, it should reformulate the question presented, so as to focus attention on the core issue of the meaning and application of the prudence requirement for ESOP fiduciaries investing in company stock. Gov't Br. 19. Unfortunately, the corresponding question presented in the petition merely asks whether the complaint had to plausibly allege that the plan fiduciaries "abused their discretion by remaining invested in employer stock." Pet. i. But there is no controversy about whether an abuse of discretion standard governs plan fiduciaries. As the government notes, the issue on which controversy has arisen (though not with respect to *un*constrained fiduciaries, as noted above) is how much discretion fiduciaries have under ERSIA Section 1104(a)(1)(B).

On November 7, 2013, a petition for certiorari was filed in *Kopp v. Klein*, *supra*. The questions presented in that case are:

> 1. Does the so-called *Moench v. Robertson*, 62 F.3d 553 (1995), *cert. denied*, 516 U.S. 1115 (1996) "presumption of prudence," invented by the Third Circuit, which is not found in the text of the Employee Retirement Income Security Act of 1974 ("ERISA"), have any place in the judicial review of the actions and inactions of ERISA fiduciaries who must conduct themselves according to the prudent fiduciary standard which is found in the text of ERISA?
>
> 2. If the "presumption of prudence" does exist and should be applied to the actions and inactions of

> ERISA fiduciaries, should the scope of judicial review be dependent upon the amount of discretion given to the fiduciaries under the plan document such that fiduciaries like the Idearc fiduciaries, who had actual discretion to change the retirement plan investments, be accorded no judicial deference as they were not constrained from acting to protect their wards?

13-578 Pet. i. Unlike here, those questions presented *do* squarely raise the issues the government believes merit this Court's review. If further review were warranted, the Court should grant certiorari in a case like *Kopp*, in which petitioners clearly raised the core issues, rather than a case like this one, in which they did not.

III. THE ISSUES HERE WOULD BE BETTER CONSIDERED ON A FULL FACTUAL RECORD

In reformulating the questions presented in this case (Br. 19), the government correctly puts emphasis on the question whether there is a presumption of prudence and what it takes to rebut it. Contrary to the government's contention (Br. 18), those questions would be much more fruitfully addressed on a more complete factual record. In particular, insofar as a presumption of prudence is recognized, there are a large variety of terms that courts have employed to describe what must be shown to rebut it. *See, e.g.*, *Kirschbaum*, 526 F.3d at 255-256 (rebuttal must show company's "viability as a going concern was . . . threatened," but not necessarily that it was "about to collapse."); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140-141 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012) ("dire situation"); *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 994 (7th Cir. 2013) ("extreme

risks ... that outweigh the flexibility of a plan that allows employees to select from among a variety of investment options"). When considering the issue in the abstract (and under a statute that gives no guidance on how great a departure from the duty of prudence is warranted), it is difficult to formulate a clear or coherent standard.

If review were warranted on the question of fiduciary duty with respect to employer stock in an ESOP, the Court would be in a much better position to consider it in a case presenting actual facts regarding the situation the fiduciaries found themselves in; the analysis, if any, they undertook of alternative investment options; and the steps, if any, they took to serve the interests of participants and beneficiaries. Such a factual setting could crystallize the inquiry and enable the Court to adopt an appropriate standard to interpret the duty of prudence in Section 1104(a)(1)(B).

IV. FURTHER REVIEW IS NOT WARRANTED ON THE SECOND QUESTION PRESENTED

We agree with the government that further review is unwarranted on the second question presented. *See* BIO 27-33, Gov't Br. 20-23. As the government points out, the Second and Ninth Circuits have recently joined the unanimous view of the courts of appeals that individuals "act[] as ERISA fiduciaries when they incorporate[] [the employer's] SEC filings into the SPD distributed to plan-participants." Gov't Br. 23 (quoting *Rinehart v. Akers*, 722 F.3d 137, 152 (2d Cir. 2013)) and citing *Harris*, 2013 WL 5737307, at *16-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY, MCKENNA
& EGLESTON
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

ANDREW L. ZIVITZ
Counsel of Record
JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ MELTZER &
CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

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REPLY BRIEF

RECORD
AND
BRIEFS

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No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING &
KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Pursuant to Supreme Court Rule 15.6, Petitioners Fifth Third Bancorp, Kevin T. Kabat, and the members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan, and Mary Tuuk, file this Reply to address new points raised in Respondents' Brief in Opposition ("Opposition").

INTRODUCTION

Respondents' arguments in their Opposition do not undermine any of the compelling reasons Petitioners put forth for granting their Petition for a Writ of Certiorari ("Petition"). Rather, the Opposition reinforces that this case is an appropriate vehicle for the Court to address the important and recurring questions of ERISA law regarding (1) the proper standard of review to be applied at the pleading stage to an ESOP fiduciary's decision to remain invested in employer stock, and (2) whether the mere incorporation of allegedly false or misleading SEC filings into plan documents is a sufficient basis for an ERISA breach of fiduciary duty claim.

For more than a decade, federal district courts have conflicted over whether a presumption of reasonableness, overcome only by an abuse of discretion, should be applied to an ESOP fiduciary's investment decisions at the pleading stage. This conflict has now been answered by the circuit courts and the Second, Third and Eleventh Circuits have answered in the affirmative. The Sixth Circuit, however, disregarded this precedent and answered this question in the negative, thus creating a clear and

unwarranted split among the circuits. This conflict is problematic because circuit courts are now deciding very similar cases differently. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012). If the Sixth Circuit's decision is allowed to stand, it will encourage forum shopping among the district courts in these respective circuits and create unfairness for litigants whose identical conduct is being judged by different standards of review in different courts.

Respondents attempt to distract the Court from the seriousness of this split in authority by incorrectly arguing that no conflict exists because this case differs from *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011), *Edgar v. Avaya*, 503 F.3d 340 (3d Cir. 2007), and *Lanfear, Inc.*, 679 F.3d 1267. Respondents contend that because the Plan at issue in this case allegedly does not require that the Fifth Third Stock Fund be an investment option under the Plan, the Sixth Circuit's decision does not conflict with the application of the presumption of reasonableness at the pleading stage in *Citigroup*, *Edgar* and *Lanfear*. Opp. at 12-20. Respondents are wrong.

The Fifth Third Plan, like the plans in *Citigroup, Edgar* and *Lanfear,* expressly requires that an employer stock fund *shall* be an investment option under the Plan. In fact, the Plan language at issue in this case is essentially identical to the plan language analyzed in *Citigroup*, *Edgar* and *Lanfear*. Therefore, all four circuit court cases confronted essentially identical factual circumstances, making the split in authority all the more glaring. Identical plan language cannot justify conflicting opinions as to

whether the presumption of reasonableness applies at the pleading stage.

With regard to the issue of whether incorporation of allegedly false and misleading SEC filings into plan documents states a valid ERISA claim, Respondents unsuccessfully attempt to distinguish the Second Circuit decision of *Gearren v. The McGraw Hill Cos., Inc.*, 660 F.3d 605 (2d Cir. 2011). *Gearren* also addressed the issue of incorporating allegedly misleading SEC statements into a plan-mandated Summary Plan Description ("SPD") and held that this was insufficient to state a valid ERISA breach of fiduciary duty claim. According to Respondents, because the holding in *Gearren* was based on a pleading deficiency that allegedly does not exist in the instant case, there is no split with the Sixth Circuit. Opp. at 32-33. A simple read of Respondents' complaint, however, demonstrates that, like the complaint in *Gearren*, both contain only conclusory allegations that ERISA fiduciaries "knew or should have known" that statements in securities filings were false or misleading without any allegations of "how" these fiduciaries had such knowledge. Thus, both complaints are essentially identical.

Due to the irreconcilable decisions by the circuit courts relating to both of these issues, this Court needs to intervene to restore uniformity with respect to these important and recurring questions of ERISA law.

ARGUMENT

I. This Case is Not Distinguishable from *Citigroup*, *Edgar* or *Lanfear* to Warrant a Different Analysis or Holding

The principal argument in Respondents' Opposition is based upon a demonstrably incorrect premise. Respondents argue that, because the Fifth Third Plan does not require investment in an employer stock fund like the plans in *Citigroup*, *Edgar* and *Lanfear*, the Sixth Circuit's decision not to apply the presumption of reasonableness at the pleading stage does not conflict with the decisions of the Second, Third and Eleventh Circuits. Opp. at 12-20. Respondents' argument is wrong.

A comparison of the express language from each of the ERISA plans completely rebuts Respondents' argument and makes clear that there is no basis to distinguish the conflicting holdings of these courts:

- ***Citigroup* Plan:** "Trustee *shall* maintain, within the Trust, the Citigroup Common Stock Fund and other Investment Funds." *Citigroup*, 662 F.3d at 133-34 (citing § 7.01 of the Citigroup Plan) (emphasis added).

- **Fifth Third Plan:** "[I]n all events, the Fifth Third Stock Fund, as described in Section

3.4(a)(1) below, *shall* be an investment option." Reply App. 45 (emphasis added).[1]

- ***Citigroup* Plan:** Trustee must "maintain at least 3 investment Funds in addition to the Citigroup Common Stock Fund." *Citigroup*, 662 F.3d at 133-34 (citing § 15.06(b) of the Citigroup Plan).

- **Fifth Third Plan:** "In all events, the Administrator *shall* direct the Trustee to make available at least three investment funds in addition to the Fifth Third Stock Fund." Reply App. 26-27 (emphasis added).

- ***Edgar* Plans:** "Plans provide that the investment options '*shall* include the Avaya Stock Fund, which *shall* be invested primarily in shares of Avaya common stock, with a small portion in cash and other liquid investments.'" *Edgar*, 503 F.3d at 343 (emphasis added).

- **Fifth Third Plan:** "The Trustee *shall* segregate a portion of the Plan Assets into a separate fund known as the 'Fifth Third Stock Fund.' The Fifth Third Stock Fund *shall* be invested primarily in shares of common stock of Fifth Third Bancorp." Reply App. 27 (emphasis added).

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[1] Because the Fifth Third Plan documents were attached by Respondents to their complaint and are central to their claims, they were properly considered by the district court below, *see, e.g., Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88-89 (6th Cir. 1997), and therefore can be analyzed by this Court on review.

- ***Lanfear* Plan:** "The language of the Plan requires that one of the available investment funds be a 'Company Stock Fund.' The 'Company Stock Fund' is 'the Investment Fund invested primarily in shares of [Home Depot] stock.'" *Lanfear*, 679 F.3d at 1271-72.

- **Fifth Third Plan:** "The Administrator shall have the discretionary authority and fiduciary duty to determine the investment funds to be made available, from time to time, for this purpose. However, in all events, the Fifth Third Stock Fund, as described in Section 3.4(a)(1) below, *shall* be an investment option." Reply App. 45 (emphasis added).

Respondents' assertion that the Fifth Third Plan did not require Petitioners to offer the Fifth Third Stock Fund as an investment option is therefore refuted by the language of the Plan itself.

Respondents also contend that because the Fifth Third Plan allowed Petitioners to "remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates," this distinguishes the decisions of the other circuits. Opp. at 10-11, 13, 15-17, 19-20. This is irrelevant. *See Gearren*, 660 F.3d at 610; *Taveras v. UBS AG*, No. 12-1662, 2013 U.S. App. LEXIS 4061, at *18-19 (2d Cir. Feb. 27, 2013). Just last month, the Second Circuit, in *Taveras*, re-affirmed its previous assertion in *Gearren* that the presumption of reasonableness applies to ERISA plans that contain language requiring investment in an employer stock fund even if those plans also contain a provision permitting fiduciaries to

terminate that same fund. *Taveras*, 2013 U.S. App. LEXIS, at *17-19 (*citing Gearren*, 660 F.3d at 610). In *Taveras*, two plans were at issue – the Plus Plan which contained language that mirrors the language in the Fifth Third Plan stating that an employer stock fund "shall" be an investment option under the plan, and a SIP Plan where the plan document contained "no language mandating that the UBS Stock Fund 'shall' be offered as an option to investors in the plan." *Id.* at *17-25. The court held that the fiduciaries of the Plus Plan were entitled to the presumption of reasonableness at the pleading stage, but the fiduciaries of the SIP Plan were not. *Id.* at *19, 25. In reaching this holding, the Second Circuit found it irrelevant that the Plus Plan contained language permitting the fiduciaries to terminate the stock fund as an investment option at its discretion:

> The Plan Document does provide the Plus Plan Investment Committee a means by which to terminate the company's fund as an investment option if it so chooses. But the ability to remove the company's fund from those funds available to plan investors existed also in *Gearren*, where we applied the presumption of prudence. *See Gearren II*, 660 F.3d at 610. As the District Court held, "[b]ecause the Plus Plan [Plan Document] clearly and explicitly limits the trustee's discretion by requiring that the UBS Stock Fund be offered as an investment option, the Plus Plan fiduciaries are entitled to a presumption of prudence." (citations omitted). We agree that the Plus Plan Document required the plan's fiduciaries to offer the UBS Stock Fund and, therefore, affirm the District Court's

> holding that the fiduciaries of the Plus Plan are entitled to the presumption of prudence in reviewing their decision to offer the UBS Stock Fund as an investment option. *Id.* at *18-19.

Virtually identical plan language is at issue here. Accordingly, there is no justification for the Sixth Circuit's refusal to apply the presumption of reasonableness at the pleading stage to Petitioners' continued investment in employer stock, while the Second, Third and Eleventh Circuits did the opposite under identical factual circumstances. This is a clear, obvious circuit split which subjects fiduciaries to different standards of review in different courts for identical conduct pursuant to identical plan language. This is a genuine conflict ripe for resolution by this Court now.[2]

II. The Second Circuit's *Gearren* Holding is Not Distinguishable on the Issue of Incorporation of SEC Filings

In response to Petitioners' citation to *Gearren*, Respondents argue that the Second Circuit's holding was premised on the plaintiffs' failure to allege that the defendants knew the SEC statements incorporated into the SPD were false and misleading, and that this

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[2] Respondents make the plea for this Court to delay review of this issue until more of a factual record has been developed in this case. *See* Opp. at 12. However, whether or not Petitioners are entitled to application of the presumption of reasonableness at the pleading stage is clearly a legal question that is currently being addressed by the circuit courts – at the pleading stage – so no additional facts are necessary to its resolution.

pleading deficiency is not present in this case. Opp. at 32-33. This is a misstatement of the *Gearren* opinion.

In *Gearren*, as well as a subsequent Second Circuit opinion on this exact issue, *In re Glaxosmithkline ERISA Litig.*, No. 11-2289, 2012 U.S. App. LEXIS 18552, at *10 (2d Cir. Sept. 4, 2012), the court clearly stated that its dismissal of the plaintiffs' breach of fiduciary duty claims based on incorporation of SEC statements into plan-mandated SPDs was not because the plaintiffs failed to make the conclusory allegation that the defendants knew or should have known the SEC statements were false and misleading, but rather because they failed to allege "how" the defendants obtained this knowledge. *Gearren*, 660 F.3d at 611.

Respondents here made barely a conclusory allegation of knowledge (*see* Complaint ¶¶ 49, 59), and completely fail to identify a single allegation in their complaint of "how" Petitioners, as purported ERISA fiduciaries, would have had knowledge of misleading SEC statements. As explicitly stated by the Second Circuit, "we decline to hold that the Plan fiduciaries were required to perform an independent investigation of SEC filings before incorporating them into the SPDs." *Glaxosmithkline*, 2012 U.S. App. LEXIS 18552, at *9 (*quoting Citigroup*, 662 F.3d at 145). In fairness to plan fiduciaries in the Sixth Circuit, the same rule must apply.

The Sixth Circuit's holding that the mere incorporation of allegedly false and misleading SEC filings into a plan-mandated SPD is sufficient to state an ERISA breach of fiduciary duty claim directly conflicts with the Second Circuit holdings in *Gearren*

and *Glaxosmithkline*.[3] Accordingly, the Court should grant certiorari and summarily reverse the Sixth Circuit's decision, or alternatively, accept this case for plenary review.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, a writ of certiorari should be granted.

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[3] Respondents' attempt to distinguish *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008), and *Lanfear*, 679 F.3d at 1284, on the ground that those cases involved the incorporation of SEC filings into a prospectus, not a plan-mandated SPD, also fails. Opp. at 31-32. The only allegations of incorporation that exist in Respondents' complaint relate to the incorporation of SEC filings into the Plan Prospectus – *not* a plan-mandated SPD. Complaint ¶ 49. The Sixth Circuit's analysis and conflicting ruling based solely on incorporation into a plan-mandated SPD, therefore, is not supported by the allegations of Respondents' own complaint. Thus, *Kirschbaum* and *Lanfear* are directly on point and not distinguishable from the facts of this case.

Respectfully submitted,

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING &
KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

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APPENDIX 1

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN as amended and restated effective as of December 31, 2000

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ARTICLE 1

INTRODUCTION AND PURPOSE

1.1 Amendment and Restatement. Fifth Third Bank hereby amends and restates The Fifth Third Bancorp Master Profit Sharing Plan in its entirety, effective as of December 31, 2000; provided however, such other effective dates as are specified in the Plan for particular provisions shall be applicable.

1.2 Purposes of the Plan. The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries. Except as otherwise provided by Sections 4.8 and 5.2, the assets of the Plan shall be held for the exclusive purpose of providing benefits to Participants and their beneficiaries and defraying reasonable expenses of administering the Plan, and it shall be impossible for any part of the assets or income of the Plan to be used for, or diverted to, purposes other than such exclusive purposes. In accordance with section 401(a)(27) of the Code, the Plan is hereby designated as a profit sharing plan except with respect to the following portions of the Plan which shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code, designed to invest primarily in qualifying employer securities:

(a) the portion of the Plan attributable to Employer matching contributions under Section 4.4 (credited to the Employer Matching Accounts);

(b) the Enterprise ESOP Accounts referred to in Append XV;

(c) the Ottawa ESOP Participant Accounts referred to in Appendix XVII;

(d) the CISP Matching Contribution Account referred to in Appendix XVI; and

(e) effective December 31, 2001, the Fifth Third Stock Fund (as described in Section 7.4) and the Fifth Third Stock Investment Option (as described in paragraph 2(d) of Appendix XVIII).

1.3 Plan Merger. In the event another plan merged into the Plan or the Old Plan after the effective date of any "GUST" provision and before having been amended for such GUST provision, then provisions in this Plan affecting qualification under section 401 of the Code with effective dates on or before the merger date shall be treated as amendments to such other plan, as it existed prior to the merger, effective as of the same effective dates. For this purpose, "GUST" refers to the Uruguay Round Agreements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997 and the Internal Revenue Service Restructuring and Reform Act of 1998.

ARTICLE 2

DEFINITIONS

As used in the Plan, the following terms, when capitalized, shall have the following meanings, except when otherwise indicated by the context:

2.1 "Account" means, with respect to a Participant, his allocable share of the Plan Assets. A Participant's Account under the Plan may include one or more of the following subaccounts:

(a) After-Tax Account;

(b) Employer Matching Account;

(c) Frozen Cash Election Account;

(d) Frozen Vesting Account;

(e) Profit Sharing Account;

(f) Rollover Account; and

(g) Section 401(k) Salary Deferral Account.

A Participant's Account also may include applicable subaccounts as specified under an Appendix to the Plan. A Participant's account, if any, under a Predecessor Plan which merges into, or makes transfers to, this Plan, shall be allocated to the appropriate subaccounts as determined by the Administrator. The establishment and maintenance of separate Accounts under the Plan is for accounting

purposes and a segregation and separate investment of each Account shall not be required.

2.2 "Accounting Date" means the last day of each June, September, December and March; provided, however, if such last day falls on a Saturday, Sunday, or holiday, then the preceding business day shall be the Accounting Date.

2.3 (a) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.5 on voluntary after-tax Participant contributions means, for a group of Participants for a Plan Year, the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employee's voluntary after-tax Participant contributions actually contributed under Section 4.5 during the Plan Year, to

(2) the Employee's Annual Compensation for such Plan Year.

(b) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.4 on Employer matching contributions means, for a group of Participants for a Plan Year the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employer match contributed to the Plan for such Plan Year under Section 4.4 on behalf of each such Employee, to

(2) the Employee's Annual Compensation for such Plan Year.

(c) In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.5 on voluntary after-tax Participant contributions, Employer matching contributions under Section 4.4 shall not be taken into account. In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.4 on Employer matching contributions, voluntary after-tax Participant contributions under Section 4.5 shall not be taken into account. For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all plans described in section 401(a) of the Code or arrangements described in section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one such plan or arrangement; provided, however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other parts of the Plan.

(d) If the Plan satisfies the requirements of section 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Contribution Percentages and for determining whether the nondiscrimination rules of Section 4.5(b) or 4.4, as the case may be, are satisfied.

(e) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.4 (a) "Actual Deferral Percentage" for a group of Participants for a Plan Year is the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the compensation reduction contributions on behalf of each such Employee for such Plan Year under Section 4.1(a), plus any amounts contributed on behalf of each such Employee for the Plan Year under Section 4.3(b), to

(2) the Employee's Annual Compensation for such Plan Year.

(b) For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all cash or deferred arrangements under section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one cash or deferred arrangement under section 401(k) of the Code; provided however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other portions of the Plan.

(c) If the Plan satisfies the requirements of section 401(k), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if

aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Deferral Percentages and for determining whether the nondiscrimination rules of Section 4.3(c) are satisfied.

(d) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.5 "Administrator" or "Plan Administrator" means the Fifth Third Bank Pension and Profit Sharing Committee. Members of said Committee shall be appointed by, and serve at the pleasure of, the President and Chief Executive Officer of Fifth Third Bank. A reference to the Plan Administrator includes, where applicable, its delegate.

2.6 "Affiliate" means each of the following for such period of time as is applicable under section 414 of the Code:

(a) a corporation which, together with the Employer, is a member of a controlled group of corporations within the meaning of section 414(b) of the Code (as modified by section, 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(b) a trade or business (whether or not incorporated) with which the Employer is under common control within the meaning of section 414(c) of the Code (as modified by section 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(c) an organization which, together with the Employer, is a member of an affiliated service group (as defined in section 414(m) of the Code); and

(d) any other entity required to be aggregated with the Employer under section 414(o) of the Code.

2.7 "After-Tax Account" means the separate portion of each Participant's Account which reflects the Participant's nondeductible voluntary contributions, as adjusted in accordance with Article 7.

2.8 "Annual Compensation" means the remuneration (before reduction for withheld amounts) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer during a Plan Year, from and after becoming a Participant, in the form of base wages or salary, overtime, variable compensation, and similar compensation, but excluding payments made pursuant to product-focused incentive plans, Jeanie maintenance payments, tuition refund reimbursements, Profit Sharing Flex Dollars (whether or not received in cash), and similar payments and benefits. Performance-based additional cash compensation incentives (other than variable compensation) shall be excluded from Annual Compensation unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all Employees or all Non-Highly Compensated Employees covered by such incentive program; provided, however, in all events an Employee eligible under a

performance-based additional cash compensation incentive program (other than variable compensation) shall have his Annual Compensation limited to $125,000 for the Plan Year. For purposes of allocating profit sharing contributions under Section 4.2, "Annual Compensation" prior to a Participant's completion of one Eligibility Year shall be disregarded.

Solely for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage, the Administrator, in its discretion, may use the definition of "Annual Compensation" set forth in the above paragraph, or the following definition. If the Administrator so determines, "Annual Compensation" for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage shall mean the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code) which is paid by the Employer to an Employee during a Plan Year including amounts that otherwise would have been included within this definition but for section 402(a)(8) of the Code (relating to a salary reduction election under section 401(k) of the Code), section 125 of the Code (relating to the cafeteria or flexible benefit plans), section 132(f)(4) (effective for Plan Years beginning after December 30, 2000), section 402(h) of the Code (relating to SEPs),

section 403(b) of the Code (relating to certain tax deferred annuities), section 457(b) of the Code (relating to deferred compensation plans of state and local governments and tax-exempt organizations), section 414(h)(2) of the Code (relating to certain picked-up employee contributions). For purposes of determining the Actual Contribution Percentage applicable to Employer matching contributions, the Administrator may either exclude, or include, such Annual Compensation paid to an Employee prior to the time he completes one Eligibility Year.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Annual Compensation shall be taken into account. Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.9 "Beneficiary" means the person or persons entitled to receive the distributions, if any, payable under the Plan upon or after a Participant's death, as such Participant's Beneficiary. Each Participant may designate a Beneficiary by filing the proper form with the Administrator. A Participant may designate one or more contingent Beneficiaries to receive any distributions after the death of a prior Beneficiary. A designation shall be effective upon said filing, provided that it is so filed during such Participant's lifetime, and may be changed from time to time by the Participant; provided however, if a Participant has at least one Hour of Service or at least one hour of paid leave from the Employer (or any other employer for whom service

is treated as service for the Employer) on or after August 23, 1984 and is survived by a Surviving Spouse, then such spouse shall be his Beneficiary unless the designation of another Beneficiary is consented to by such spouse in a written consent which acknowledges the effect of such designation, acknowledges the specific Beneficiary or Beneficiaries, and is witnessed by a Plan representative or a notary public.

If there is no designated Beneficiary to receive any amount that becomes payable to a Beneficiary, then such amount shall be paid to the person or persons in the first surviving class of the following classes of successive preference beneficiaries, and the members thereof shall receive equal shares of any distribution payable:

Class 1. the Participant's Surviving Spouse;

Class 2. the Participant's surviving children or issue of deceased children, per stirpes;

Class 3. the Participant's surviving parents;

Class 4. the Participant's surviving brothers and sisters; and

Class 5. the Participant's executor or administrator.

2.10 "Break in Service" means:

(a) before January 1, 1985, a Severance of at least 12 consecutive months; and

(b) after December 31, 1984, a Severance of at least 72 consecutive months; provided however, if as December 31, 1984, service was not required to be taken into account under the provisions of section 410(a) or 411(a) of the Code, then this Subsection (b) shall not cause such service to be taken into account.

2.11 "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.12 "Deferrable Compensation" means Annual Compensation other than variable compensation; plus performance based additional cash compensation incentives (other than variable compensation) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer from and after becoming a Participant whether or not such amounts are considered "Annual Compensation"; plus Profit Sharing Flex Dollars allocable to periods after becoming a Participant (without regard to how the Participant elects to utilize such Profit Sharing Flex Dollars). Prior to December 31, 2001, overtime and shift differential shall also be excluded.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance

with section 401(a)(17) of the Code) of a Participant's Deferrable Compensation shall be taken into account. Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply. This $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted) limit may be applied proportionately to each pay period or in any other reasonable manner determined by the Administrator or its delegate.

2.13 "Disability" means an incapacity caused by bodily injury or disease which prevents an Employee from performing his regular duties, based upon medical evidence satisfactory to the Administrator.

2.14 "Early Retirement Age" means age 55 and at least 5 Vesting Years.

2.15 "Effective Date" means December 31, 2000.

2.16 "Eligible Participant" means a Participant, described in Section 4.2(c), who is qualified to receive an allocation of the Employer contribution under Section 4.2 for a Plan Year. As provided in an applicable Appendix, certain individuals may be excluded from the term "Eligible Participant."

2.17 (a) "Eligibility Service" means, subject to (b) below, an individual's Service.

(b) A reemployed person's prior Service shall be disregarded and he shall be treated as a new employee for purposes of determining Eligibility Service if he has incurred a Break in Service and if he

did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if such Break in Service equals or exceeds his Eligibility Service before such Break in Service, provided that such Eligibility Service before such Break in Service shall be deemed not to include any of such individual's Eligibility Service not taken into account by reason of any prior Breaks in Service incurred by him.

2.18 "Eligibility Year" means 365 days of Eligibility Service (whether or not continuous).

2.19 "Employee" means an individual who is employed by an Employer and who is considered by the Employer in its sole and absolute discretion to be an Employee for purposes of the Plan. An individual who performs services for the Employer as an independent contractor, leased employee, employee of a temporary agency or in any other capacity other than as an employee of an Employer shall not be considered an Employee for purposes of the Plan. A determination that an individual is an employee of the Employer for other purposes such as employment tax purposes, shall have no bearing whatsoever on the determination of whether the individual is an Employee under the Plan if the Employer does not consider the individual to be its Employee for purposes of the Plan. As provided in an applicable Appendix, certain individuals may be excluded from the term "Employee."

2.20 "Employer" means Fifth Third Bank and each other subsidiary (direct or indirect) of Fifth Third Bancorp except for any such subsidiary excluded under the terms of the Plan (including an Appendix). An entity shall not be considered an Employer either

before or after the time it is a subsidiary (direct or indirect) of Fifth Third Bancorp.

2.21 "Employer Matching Account" means the separate portion of each Participant's Account which reflects the Employer's contributions under Section 4.4 as adjusted in accordance with Article 7.

2.22 "Employment Commencement Date" means, with respect to an individual, the date on which he first performs an Hour of Service.

2.23 "ERISA" means the Employee Retirement Income Security Act of 1974, as amended, at the particular time applicable. A reference to a section of ERISA shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.24 "Five-Percent Owner" means any person who owns (or is considered as owning within the meaning of sections 318 and 416 of the Code) more than 5 percent of the outstanding stock of the Employer or stock possessing more than 5 percent of the total combined voting power of all stock of the Employer.

2.25 "Frozen Cash Election Account" means the separate portion of each Participant's Account which reflects contributions of the "Elective Percentage" of his "Profit Sharing Allocation" (as those terms were defined in the Old Plan) for Plan Years before 1997, as adjusted in accordance with Article 7.

2.26 "Frozen Vesting Account" means the separate portion of each Participant's Account which reflects the

Employer's contributions for Plan Years before 1997 of that portion of each Participant's "Profit Sharing Allocation" which exceeds his "Elective Percentage" (as those terms were defined in the Old Plan) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.27 (a) "Highly Compensated Employee" with respect to a Plan Year beginning after December 31, 1996, means, as determined under section 414(q) of the Code and the Treasury Regulations thereunder, an individual who, at any time during the Plan Year is an Employee, and who:

(1) during the Plan Year or the preceding twelve month period, was at any time a Five-Percent Owner; or

(2) received Section 415 Compensation from the Employer in excess of $80,000 (as adjusted pursuant to section 414(q)(1) of the Code) during the twelve month period preceding the Plan Year, and, if the Employer so elects, was in the group consisting of the top 20 percent of Employees when ranked on the basis of Section 415 Compensation paid during such preceding twelve month period.

(b) The determination of Highly Compensated Employees shall be made in accordance with the following:

(1) For purposes of determining the number of Employees under (a)(2), the Employees described in section 414(q)(5) of the Code shall be disregarded.

(2) The Employer shall be treated as including any other entities required to be aggregated under section 414 of the Code.

2.28 "Hour of Service" means an hour for which an individual is paid, or entitled to payment, for work for the Employer or an Affiliate.

2.29 "Military Service" means, with respect to a person employed immediately prior thereto by the Employer, the period of time that he spends in the Armed Forces of the United States, or its equivalent recognized pursuant to federal law, provided he returns to the service of the Employer within such period, if any, as is then provided by law for the protection of his reemployment rights, and provided he has not been employed elsewhere before returning to work for the Employer.

2.30 "Non-highly Compensated Employee" means an individual who is not a Highly Compensated Employee and who, at any time during the Plan Year, is an Employee.

2.31 "Normal Retirement Age" means the date on which a Participant has both reached age 65 and completed 5 Vesting Years; provided, however, a Participant's Normal Retirement Age shall in no event be later than the later of the time a Participant attains age 65 or the 5th anniversary of the time the Participant commenced participation in the Plan (or any Predecessor Plan).

2.32 "Old Plan" means The Fifth Third Bancorp Master profit Sharing Plan as it existed prior to the Effective Date.

2.33 "Participant" means an Employee who satisfies the eligibility requirements of Article 3 and also means a former Employee who has an Account under the Plan. To the extent provided in an applicable Appendix, the term also includes an individual with an Account under the Plan by reason of a plan merger or transfer identified in such Appendix. As provided in an applicable Appendix, certain individuals may be excluded from the term "Participant."

2.34 "Plan" means The Fifth Third Bancorp Master Profit Sharing Plan as set forth in this document, including all Appendices, and, if amended at any time, then as so amended.

2.35 "Plan Assets" means the assets of the Plan at the particular time applicable.

2.36 "Plan Year" means:

(a) For Plan Years beginning prior to January 1, 1999, the calendar year;

(b) For the Plan Year beginning on January 1, 1999, the period commencing on January 1, 1999, and ending on December 30, 1999; and

(c) For Plan Years beginning after December 30, 1999, the 12-month period commencing on December 31 and ending on December 30.

2.37 "Predecessor Plan" means a plan identified as such in an Appendix to this Plan.

2.38 "Profit Sharing Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years after 1996 under Section 4.2(d) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.39 "Profit Sharing Allocation" has the meaning determined under Section 4.2(d).

2.40 "Reemployment Commencement Date" means the first day, after a Severance, on which an individual performs an Hour of Service.

2.41 "Rollover Account" means the separate portion of each Participant's Account which reflects his rollover contributions, if any, as adjusted in accordance with Article 7.

2.42 "Section 401(k) Salary Deferral Account" means the separate portion of each Participant's Account which reflects contributions on behalf of each Participant under Sections 4.1 and 4.3(b), as adjusted in accordance with Article 7.

2.43 (a) "Service" means the sum of the following periods (whether or not continuous), provided that no period of time shall be counted more than once:

(1) each period beginning on an individual's Employment Commencement Date or Reemployment Commencement Date and ending with his next Severance;

(2) any separation from the service of the Employer of 12 months or less;

(3) Military Service;

(4) service taken into account for a particular Participant under a Predecessor Plan. Except as otherwise provided in an Appendix, the following transition rules shall apply with respect to any Participant who has been covered under a Predecessor Plan under which service has been computed on the basis of hours of service during 12-month computation periods. Such an individual shall receive credit for a period of service consisting of:

(A) the number of years of service credited to him before the computation period (determined under the Predecessor Plan) in which the Plan is adopted, plus

(B) the greater of

(i) the period of service that would be credited to him under the elapsed time method under (a) above for his service during the entire computation period in which the adoption occurs or

(ii) service taken into account under the computation periods method as of the date of the adoption.

In addition, the individual shall receive credit for service subsequent to the adoption commencing on the

day after the last day of the vesting computation period in which the adoption occurs.

(5) as provided in an applicable Appendix, service (not otherwise taken into account under a Predecessor Plan) for a predecessor employer named in such Appendix, taken into account as provided in such Appendix.

(b) Anything in the Plan to the contrary notwithstanding, in determining an Employee's Service, he shall be entitled to such credit, if any, as is required by federal law.

2.44 "Severance" means, an absence from the employment of the Employer and all Affiliates, beginning on the earliest of death, quit, discharge, retirement or the first anniversary of any other absence (with or without pay).

2.45 "Surviving Spouse" means a Participant's surviving spouse except to the extent that a former spouse is treated as such, for purposes of the Plan, under a qualified domestic relations order as described in section 414(p) of the Code.

2.46 "Trustee" means Fifth Third Bank and its successors and assigns in trust.

2.47 (a) "Vesting Service" means, subject to (b) below, an individual's Service.

(b) To the extent included in (a) above, the following periods shall be disregarded for purposes of determining Vesting Service:

(1) each period, with respect to Fifth Third Bank, prior to January 1, 1982 or, with respect to any other Employer, prior to such Employer's adoption of the Plan, if such service would have been disregarded under the rules of The Fifth Third Bank Profit Sharing Plan or of such other Employer's Predecessor Plan, as the case may be, relating to breaks in service or failure to complete a required period of service within a specified period of time, as such rules were in effect on the applicable date; and

(2) each period prior to a Break in Service if, at the time of incurring such Break in Service, the individual did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if the Break in Service equals or exceeds his Vesting Service before such Break in Service, provided that such Vesting Service before such Break in Service shall be deemed not to include any of such individual's Vesting Service not taken into account hereunder by reason of any prior Breaks in Service.

2.48 "Vesting Years" mean the number of whole years of a Participant's Vesting Service, whether or not such Vesting Service was completed continuously. Nonsuccessive periods of Vesting Service (whether or not consecutive) shall be aggregated on the basis that 365 days of Vesting Service equal a whole Vesting Year.

* * *

ARTICLE 7

INVESTMENT OF ACCOUNTS

7.1 Funding Policy and Method.

(a) Establishment. The Administrator shall establish, for the Plan, a funding policy and method, which shall be consistent with the objectives of the Plan, ERISA and any other applicable legal requirements and which shall identify the Plan's short-run and long-run financial needs with respect to liquidity and investment growth, as the same may change from time to time. Such funding policy shall be communicated as soon as practicable to those who are responsible for investment of the Plan Assets.

(b) Funding Entity. The Plan Assets shall be held under and the benefits under the Plan shall be funded through The Fifth Third Profit Sharing Trust as it may be amended from time to time. The trust so established and maintained is and shall be a part of the Plan. In addition, Plan Assets may be held under and the benefits under the Plan may be funded through such other trusts as the Employer, in its discretion, may establish or cause to be established or entered into for the purposes of carrying out the Plan. The Employer shall determine the form and terms of any such trust, from time to time, consistent with the objectives of the Plan, ERISA and any other applicable legal requirements, and may remove any trustee and select a successor trustee or trustees or may terminate any such trust. Any such trust so established and maintained is and shall be a part of the Plan.

(c) Investment Elections.

(1) Prior to January 1, 2001. Prior to January 1, 2001, each Participant shall elect the manner in which his Section 401(k) Salary Deferral Account, After-Tax Account and Rollover Account and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Prior to January 1, 2001, the investment funds available under the Plan shall be the general trust fund (in which Plan Assets over which the Participant has no investment discretion are segregated), the Fifth Third Stock Fund (as defined below) and such other investment funds as the Administrator directs the Trustee to make available.

(2) On and After January 1, 2001. After December 31, 2000, each Participant shall elect the manner in which his Account, excluding his Employer Matching Account, and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Effective January 1, 2001, the Administrator shall direct the Trustee as to the investment funds to be made available, including the Fifth Third Stock Fund (as defined below).

(3) Procedural. An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations,

require an election to apply consistently to all subaccounts and provide for the investment of an Account of a Participant who fails to make an investment election.

(d) Employer Matching Account. Subject to Section 7.3, the Plan Assets attributable to the Employer Matching Accounts shall be invested in the Fifth Third Stock Fund (as defined below).

7.2 Investment Adjustment. The Administrator shall account for the investments and investment transactions attributable to each Account separately. Earnings or losses on Plan Assets attributable to a particular Account shall be allocated solely to that Account. All determinations of the investment adjustments under this Section and under Sections 7.3 and 7.4 below and any Appendix shall be made by the Trustee, and such determinations when so made by the Trustee shall be conclusive and shall be binding upon all persons.

7.3 Diversification Election. Each Participant who has attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation) may elect the manner in which his Employer Matching Account and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The first such investment election for a Participant must be implemented no later than 90 days following the Plan Year which follows the Plan Year in which the Participant both attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation). In all events, the Administrator shall direct the Trustee

to make available at least three investment funds in addition to the Fifth Third Stock Fund (as defined below).

An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules consistent with the requirements of section 401(a)(28) of the Code including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations, and provide for the investment of an Employer Matching Account of a Participant who fails to make an investment election.

7.4 Fifth Third Stock Fund.

(a) General. The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(b) Investment Adjustment. The Plan Assets comprising the Fifth Third Stock Fund shall be valued daily at fair market value and the Participants, Accounts (and appropriate subaccounts) shall be adjusted daily to reflect the change in value of the Fifth Third Stock Fund.

(c) Voting of Employer Securities. To the extent a Participant's Account (or any subaccount) is invested in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the Trustee in writing as to the manner in which the shares represented by his interest in such Fund are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(d) ESOP Dividend Pass-Through Election. Effective December 31, 2001, commencing with the dividends payable on the common stock of Fifth Third Bancorp to shareholders of record on December 31, 2001, a Participant with an Account (including any subaccount) invested in the Fifth Third Stock Fund (or in the event of his death, his Beneficiary), shall have the right to elect, in accordance with instructions or procedures of the Administrator, or its delegate to either (1) leave such dividends in the Plan for reinvestment in common stock of Fifth Third Bancorp under the Fifth Third Stock Fund or otherwise; or (2) take the dividends in cash. This election shall also

be available with respect to the Enterprise ESOP Accounts (described in Appendix XV), the Ottawa ESOP Participant Accounts (described in Appendix XVII) and the Fifth Third Stock Investment Option (described in Appendix XVIII including the comparable investment choice under the Old Kent Thrift Plan effective as of December 31, 2001, as it existed on such date immediately prior to the merger into this Plan).

7.5 Life Insurance. No life insurance shall be purchased under the Plan.

7.6 Loans.

(a) Eligibility. Upon filing the proper application form with the Administrator by a Participant, the Administrator may authorize and direct the Trustee on behalf of the Plan, to grant a loan to such Participant from the Plan Assets, subject to the conditions set forth below.

(b) Conditions. Loans under (a) above shall meet all of the following requirements:

(1) Loans shall be made available to all Participants on a reasonably equivalent basis; provided that loans shall not be available to Participants who are not Employees (other than former Employees who are parties in interest within the meaning of section 3(14) of ERISA).

(2) Loans shall be made available only in the following circumstances:

(A) in the event of a hardship (as defined in Section 8.1(b)) of the Participant;

(B) if the Participant will use the loan proceeds for any educational needs of the Participant or family members of the Participant (including the repayment of any prior student loan);

(C) if the Participant will use the loan proceeds for the care of one or more family members of the Participant; or

(D) if the Participant will use the proceeds to purchase (through the exercise of stock options or otherwise) for investment purposes shares of common stock of Fifth Third Bancorp (including the repayment of any loan incurred by the Participant prior to November 1, 1996, if the proceeds of such prior loan were used for such purpose).

(3) Prior to borrowing from the Plan, a Participant must withdraw all of his After-Tax Account (if any) and any other amounts in a subaccount referred to in an Appendix attributable to after-tax employee contributions.

(4) A Participant may borrow solely from his Section 401(k) Salary Deferral Account, Frozen Cash Election Account, Rollover Account and other subaccounts referred to in an Appendix to the extent attributable to elective deferrals described in section 402(g)(3) of the Code or rollover contributions.

(5) A Participant may have only one loan outstanding at any time.

(6) A Participant loan must be in an amount equal to at least $1,000.

(7) Loans shall not be made available to Highly Compensated Employees in an amount greater than the amount made available to other Participants.

(8) Loans shall bear a reasonable rate of interest equal to the rate that the Fifth Third Bank, in its lending business, would charge on a similar loan.

(9) Loans shall be adequately secured, which security shall, notwithstanding Section 14.2, consist of an assignment of up to 50 percent of a borrowing Participant's nonforfeitable Account under the Plan. The Administrator may allow such an assignment to consist solely of amounts not attributable to elective deferrals described in section 402(g)(3) of the Code if such amounts would constitute adequate security.

(10) Loans shall be repaid only by payroll withholding properly authorized by the Participant; provided that the Administrator may allow complete prepayment through other means; and provided further, a Participant who is on a leave of absence may pay installments by personal check or other means to the extent his pay (if any) is insufficient to meet the repayment schedule.

(11) No Participant loan shall exceed the limitations under (c) below.

(12) In the event of default, foreclosure on the Participant's accrued nonforfeitable benefit, to the

extent used as security for the loan, will occur after a distributable event occurs under the Plan. Events constituting default shall be specified in the promissory note or security agreement to be executed by the Participant.

(c) Limitation on Amount. A loan under the Plan (when added to any other loans outstanding under the Plan and any other plans taken into account under section 72(p)(2)(D) of the Code) to a Participant shall not exceed the lesser of:

(1) $50,000 reduced by the excess (if any) of -

(A) the highest outstanding balance of loans from the Plan (and other plans taken into account) during the one-year period ending on the day before the date on which such loan was made, over

(B) the outstanding balance of loans from the Plan (and other plans taken into account) on the date such loan was made, or

(2) one-half of the nonforfeitable portion of the Participant's Account.

(d) Distributable Event. Solely for purposes of foreclosure on the Participant's nonforfeitable Account, to the extent used as security for the loan, default on a Participant's note shall be deemed to be a distributable event for such a Participant (in addition to the other distributable events under the Plan); provided however, with respect to a Participant's Section 401(k) Salary Deferral Account, Frozen Cash

Election Account and any other amounts subject to the distribution limitations of section 401(k)(2), to the extent used as security for the loan, such a default shall be deemed a distributable event if, and only if, the Participant has attained age 59-1/2.

(e) Repayment Period. Each loan, by its terms, shall be required to be repaid within 5 years. In addition, loans shall be due and payable in full upon a Participant's termination of employment (except in the case of parties in interest within the meaning of section 3(14) ERISA) and such repayment need not be through payroll withholding.

(f) Level Amortization. Each loan shall be subject to substantially level amortization, with payments of principal and interest not less frequently than quarterly, over the term of the loan.

(g) Earmarking. If a loan is made to a Participant pursuant to (a) above, then his interest in other Plan Assets shall be reduced by the amount of the loan, the loan shall be an investment of his Account, and interest and other amounts allocable to such loan shall be allocated only to his Account.

(h) Effect of Default on Benefits. Upon a Participant's death, if less than 100 percent of his Account is payable to his Surviving Spouse, then, in determining the amount payable to the Surviving Spouse, the amount treated as payment in satisfaction of any loan (including accrued interest) shall first be treated as reducing the Account.

(i) Administration. The Administrator is authorized to administer the loan program. Loans will be approved if the proper forms and documentation are completed and delivered to the Administrator, the amount of the loan requested does not exceed the limits specified in this Section, adequate security authorized in this Section is delivered to the Trustee, and the other provisions of this Section are satisfied. The Administrator is authorized to impose on a Participant a reasonable administrative fee for his loan.

* * *

APPENDIX 2

THE FIFTH THIRD PROFIT SHARING - TRUST AGREEMENT (as amended and restated)

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THE FIFTH THIRD PROFIT SHARING TRUST AGREEMENT (as amended and restated)

This amended and restated Trust Agreement and Declaration of Trust executed this 28 day of December, 2001, by and between Fifth Third Bank, an Ohio banking corporation in its individual corporate capacity (the "Employer"), and Fifth Third Bank, an Ohio banking corporation acting in its fiduciary capacity as trustee (the "Trustee").

WITNESSETH:

WHEREAS, the Employer has adopted and maintains the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"), and

WHEREAS, The Fifth Third Profit Sharing Trust (the "Trust") serves as the funding vehicle for the Plan,

WHEREAS, the Trust was established and is presently maintained pursuant to an amended and restated Trust Agreement and Declaration of Trust executed December 29, 1982, effective as of January 1, 1982, as subsequently amended by the First through Fifth Amendments,

WHEREAS, under Section 7.1 of the amended and restated Trust Agreement and Declaration of Trust, the Employer and the Trustee have the right to amend at any time,

WHEREAS, the Employer and the Trustee have determined to amend and restate the Trust Agreement and Declaration of Trust in its entirety as The Fifth Third Profit Sharing Trust (as amended and restated), as herein stated, and

WHEREAS, this Trust Agreement and Declaration of Trust is intended to qualify under the provisions of sections 401(a) and 501(a) of the Internal Revenue Code of 1986, as amended.

NOW, THEREFORE, the Employer and the Trustee do hereby agree each with the other as follows.

ARTICLE 1

TITLE, PURPOSE AND DEFINITIONS

1.1 Title. The Trust established pursuant hereto shall be known as The Fifth Third Profit Sharing Trust (hereinafter referred to as the "Trust").

1.2 Purpose. The Trust is established for the purpose of holding the Plan Assets and for the exclusive benefit of Participants and their beneficiaries. Subject to the provisions of the Plan that are consistent with ERISA, it shall be impossible, by any means, and at any time before the satisfaction of all liabilities to Participants or their beneficiaries, for any part of the Plan Assets to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants and their beneficiaries.

1.3 Definitions. As used in this Trust Agreement, the following terms shall have the following meanings and provisions applicable thereto.

(a) "Administrator" means the individual, group of individuals, or entity appointed to administer the Plan; provided that if none is so appointed, then it means the Employer.

(b) "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

(c) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended, at the particular time applicable.

(d) "Participant" means a person who is a participant in the Plan.

(e) "Plan" means the Fifth Third Bancorp Master Profit Sharing Plan and if amended at any time, then as so amended.

(f) "Plan Assets" means the assets of the Plan at the particular time applicable.

ARTICLE 2

CONTRIBUTIONS AND PAYMENTS

2.1 Receipt of Contributions. The Trustee shall receive any contributions paid to it in cash or in the form of such other property as it may from time to time deem acceptable and which shall have been delivered to it. The Trustee shall also receive a transfer of Plan Assets from any other funding vehicle of the Plan or predecessor plan in connection with a plan merger or plan-to-plan transfer. All contributions and transfers so received, together with the income therefrom and any other increment thereon, shall be held, invested, reinvested and administered by the Trustee pursuant to the terms of this Trust Agreement. The Trustee shall not be responsible for the calculation or collection of any contribution or transfer under or required by the Plan, or for the determination of whether any contributions or transfers received by it are correct or are otherwise in compliance with the provisions of the

Plan, but shall be responsible only as provided in this Trust Agreement for property received by it.

2.2 Payments from the Plan Assets.

(a) From time to time, upon the Trustee's receipt of written directions from the Administrator that payments from the Plan are due, the Trustee shall make such payments from the Plan Assets to such persons in such form, in such amounts and at such time as the Administrator shall have directed; provided however, the Trustee shall not be required to make any payment from the Plan Assets until it receives copies of such government filings and/or approvals as the Trustee may reasonably request; and provided further, contributions to the Plan shall be returned to the Employer only under those circumstances set forth in the Plan and consistent with ERISA.

(b) Upon the distribution of Plan Assets in accordance with (a) above, to the extent permitted by law; the Trustee shall be released and discharged from all further accountability or liability respecting such Plan Assets, shall be fully protected in making payments out of the Plan Assets in accordance with such written directions, shall have no responsibility to see to the application of such payments or to ascertain whether such directions comply with the provisions of the Plan, and shall have no responsibility for any payments made by it in good faith without actual notice or knowledge of the changed condition or status of any person receiving such payments.

(c) If any payment directed to be paid from the Plan Assets is not claimed, then the Trustee,

shall notify the Administrator of that fact promptly. The Trustee and the Administrator shall work together to search for or ascertain the whereabouts of any payee under the Plan.

(d) If any dispute arises as to the persons to whom payment of any funds or delivery of any other Plan Assets should be made by the Trustee, then the Trustee may withhold such payment or delivery until such dispute shall have been determined by a court of competent jurisdiction or shall have been settled by the parties concerned.

(e) Plan Assets held hereunder shall be available to pay benefits under any and all parts of the Plan.

ARTICLE 3

INVESTMENT DUTIES AND POWERS OF THE TRUSTEE

3.1 Investment Duties. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee shall, except to the extent it deems it expedient (pending investment of Plan Assets or pending payment of current expenses or benefits of the Plan) to keep Plan Assets temporarily uninvested and in cash, invest and reinvest the principal and income of the Plan Assets and keep the Plan Assets invested, without being restricted to securities or property of the character authorized for investments by trustees under the laws of any state, district or territory, in such securities and/or in such property, real or personal, tangible or intangible, or part interest therein,

wherever situate, whether or not productive of income, or consisting of wasting assets, as the Trustee shall deem advisable.

3.2 Investment Powers. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee is authorized and empowered, in addition to powers granted under any applicable statutes, regulations or rules which, to the extent of their granting of powers applicable to trusts of a similar nature to the Trust, are incorporated herein by reference:

(a) to invest in any collective, common or pooled trust fund operated or maintained by any bank or trust company, including the Trustee or an affiliate of the Trustee, exclusively for the commingling and collective investment of monies or other assets held under or as a part of a plan which is established in conformity with and qualifies under section 401(a) of the Code; and, anything herein to the contrary notwithstanding, to the extent monies or other assets are transferred to such collective trust in exchange for an interest in such collective trust, the terms and conditions of such collective trust, as amended from time to time, shall govern the investment duties, responsibilities and powers of the trustee of such collective trust and, to the extent required by law, such terms, responsibilities and powers shall be incorporated herein by reference and shall be a part of this Trust Agreement; and, for purposes of valuation, the value of the interest maintained by the Plan Assets in such collective trust shall be the fair market value of

the collective fund units held by the Trustee determined in accordance with generally recognized valuation procedures;

(b) to purchase and subscribe for any securities or other property and to retain such securities or other property in trust;

(c) to sell at public or private sale, for cash, or upon credit, or otherwise dispose of any property, real or personal, and no person dealing with the Trustee shall be bound to see to the application or to inquire into the validity, expediency or propriety of any such sale or other disposition;

(d) to exercise any conversion privilege, subscription right or other option pertaining to or in connection with securities or other property held by it;

(e) to exercise itself, or by general or limited power of attorney, any right, including the right to vote, incident to any securities or other property held by it;

(f) to join in, dissent from or oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which it may hold stocks, bonds or other securities or in which it may be interested, to pay any expenses, assessments or subscriptions in connection therewith, and to accept and to hold any other securities issued in connection therewith;

(g) to register any investment held in the Plan Assets in its own name or in the name of a nominee or to hold any investment in bearer form;

(h) to employ suitable agents, accountants and counsel and to pay their reasonable expenses and compensation;

(i) to hold any part or all of the Plan Assets uninvested;

(j) to invest in savings accounts, certificates of deposit and other deposits which bear a reasonable rate of interest, with any financial institution or quasi financial institution, either domestic or foreign, including any such financial institution operated or maintained by any Trustee (or an affiliate) in its corporate capacity;

(k) to form corporations and partnerships and to create trusts to hold title to any securities or other property, all upon such terms and conditions as it may deem advisable;

(l) to invest in open-end investment companies (mutual funds) and closed end investment companies, investment trusts, and in any partnership, limited or unlimited, joint venture or other form of joint enterprise created for any lawful purpose;

(m) to adjust, settle, contest, compromise and arbitrate any claims, debts, or damages due or owing to or from the Plan Assets, and to sue, commence or defend any legal proceedings in reference thereto;

(n) to borrow money upon such terms and conditions as may be deemed advisable to carry out the purposes of the Trust and to pledge securities or other property in repayment of any such loan; provided, however, that loans or advances may be made by the Trustee by way of overdrafts or otherwise on a temporary basis on which no interest is payable;

(o) to enter into any type of contract with any insurance company or companies, either for the purposes of investment or otherwise, and, to the extent the Plan so provides, to purchase any life insurance policy or annuity contract;

(p) to buy, sell, and deal in options as writer of call options against securities, stocks, convertible preferred stocks, convertible bonds and warrants, which are owned by the Trust, to repurchase written call options in a closing transaction, to deliver the securities for cash if the option is exercised, to buy put options for securities, stock, convertible preferred stock, convertible bonds and warrants, which are owned by the Trust, to resell put options, in a closing transaction and to deliver the securities for cash if the option is exercised;

(q) to appoint an investment manager, as defined in section 3(38) of ERISA, to manage (including the power to acquire and dispose of) any of the Plan Assets;

(r) to make, execute and deliver as Trustee any and all deeds, leases, mortgages, advances, contracts, waivers, releases or other instruments in

writing necessary or proper in the employment of any of the foregoing powers; and

(s) to exercise, generally, any of the powers which an individual owner might exercise in connection with property either real, personal or mixed held in the Plan Assets, and to do all other acts that the Trustee may deem necessary or proper to carry out any of the powers set forth in this Article 3 or otherwise in the best interests of the Trust.

3.3 Power of Participants to Direct Investments.

(a) Selection of Investment Funds. Under the Plan's funding policy, each Participant (and where applicable, Beneficiary and alternate payee) may elect the manner in which his Account (excluding his Employer Matching Account) and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The Administrator shall have the discretionary authority and fiduciary duty to determine the investment funds to be made available, from time to time, for this purpose. However, in all events, the Fifth Third Stock Fund, as described in Section 3.4(a)(1) below, shall be an investment option. The Administrator shall have the duty of monitoring such investment funds to determine the continued prudence of offering such funds; and the Administrator shall change the investment funds available if and when it deems it prudent to do so.

(b) Segregated Investment Funds. In addition to such investment vehicles as mutual funds and

collective or common trust funds, the Administrator may prescribe as an investment option a fund the Trustee creates by segregating a portion of the Plan Assets. The Trustee shall have full discretionary authority and responsibility to manage any such fund in accordance with the general nature and objective of the fund as directed by the Administrator (such as a "balanced" fund).

(c) Procedures. The Administrator and the Trustee shall be responsible for implementing the Participant (and, where applicable, Beneficiary and alternate payee) investment elections under such rules and procedures as may be prescribed under the Plan. Neither the Trustee, the Employer nor the Administrator shall be under any duty or obligation to review the selection of investment funds by Participants (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any fiduciary responsibility whatsoever in connection with the selection of investment funds by a Participant (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any liability or responsibility for action taken pursuant to the direction of the Participants (and, where applicable, Beneficiaries and alternate payees).

3.4 Fifth Third Bancorp Stock.

(a) Investments. The Trustee is expressly permitted to invest Plan Assets in common stock of Fifth Third Bancorp without limit, subject to the following:

(1) The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(2) The Trustee is expressly permitted, in its discretion, to invest Plan Assets in addition to those segregated in the Fifth Third Stock Fund, in common stock of Fifth Third Bancorp.

(b) Employer Matching Account. Subject to the diversification rights and other relevant provisions of the Plan, the Employer Matching Accounts under the Plan shall be invested in the Fifth Third Stock Fund.

(c) Voting of Shares.

(1) Anything in this Trust Agreement to the contrary notwithstanding, in the case of Fifth Third Bancorp common stock held in the Fifth Third Stock Fund, the Trustee shall exercise voting and other rights pertaining to any shares of Fifth Third Bancorp so held accordance with any instructions received from

the Participant (or beneficiaries) for whose account such shares are held. In the event that any Participant (or beneficiary) shall fail to so instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(2) In the case of Fifth Third Bancorp common stock held outside of the Fifth Third Stock Fund, the Trustee shall have the same power to act (or refrain from acting) with respect to any voting or other right as it has with any other Plan Asset.

ARTICLE 4

COMPENSATION, EXPENSES, AND ACCOUNTS

4.1 Compensation. The Trustee shall be entitled to such compensation for services rendered by it as may be agreed upon in writing from time to time between the Employer and the Trustee.

4.2 Trust Expenses. The expenses incurred by the Trustee in the performance of its duties, including fees for legal services, and such compensation to the Trustee as may be provided for pursuant to Section 4.1, and all other proper charges and disbursements of the Trustee, shall be paid by the Employer; provided however, the Employer may direct the payment of any or all such expenses from the Plan Assets.

4.3 Tax Assessments. The Trustee shall notify the Employer with regard to any tax assessments which it receives on any income or property maintained

in the Plan Assets and, unless notified to the contrary by the Employer at least ten (10) days before the tax is due, shall pay any such assessments from the Plan Assets. If the Employer notifies the Trustee within said period that in its opinion or in the opinion of counsel such assessments are invalid or that they should be contested, then the Trustee shall take whatever action is indicated in the notice received from the Employer or counsel, including contesting the assessment or litigating any claims.

4.4 Accounts, Records, Reports and Valuations.

(a) The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements and other transactions under the Trust and all such accounts and other records relating thereto shall be open to inspection and audit at all reasonable times by any person designated by the Employer. Within thirty (30) days following the close of the fiscal year of the Trust, the Trustee shall make a valuation of the Plan Assets (other than any insurance contracts) at fair market value as of the last day of such fiscal year and shall file with the Employer a written copy of such valuation and a written account setting forth all investments, receipts, disbursements and other transactions effected by it under the Trust during such fiscal year. To the extent permitted by law, but subject to any express provision of applicable law as may be in effect from time to time to the contrary, no person other than the Employer may require an accounting or bring any action against the Trustee with respect to the Plan Assets or its actions as Trustee.

(b) All accounts and records maintained by the Trustee with respect to the Plan Assets shall be preserved for such period as may be required under any applicable law. Upon the expiration of any such required retention period, the Trustee shall have the right to destroy such records and accounts after first notifying the Employer of its intention and transferring to the Employer any such accounts. and records requested by it. The Trustee shall have the right to preserve all accounts and records in original form, or on microfilm, magnetic tape, or any other similar process.

(c) The Trustee shall make such periodic reports to the Employer as the Trustee shall deem necessary and proper and such other reports as the Employer may reasonably request, including a valuation of the Plan Assets at fair market value as of any date requested by the Employer.

ARTICLE 5

ACTIONS OF THE TRUSTEE

5.1 General Fiduciary Duties of the Trustee. The Trustee acknowledges that it assumes the fiduciary duties established by this Trust Agreement and imposed by law. Subject to the provisions of the Plan which are consistent with ERISA and which permit Plan Assets to be returned to the Employer, the Trustee shall discharge its duties with respect to the Plan solely in the interest of the Participants and beneficiaries and for the exclusive purpose of providing benefits to such Participants and their beneficiaries and defraying reasonable expenses of administering

the Plan, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and by diversifying the investments of the Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, all in accordance with the provisions of this Trust Agreement insofar as they are consistent with the provisions of ERISA, as this Trust Agreement and ERISA may be from time to time amended.

5.2 Extent of Responsibilities. The Trustee shall have only such responsibilities as are stated in this Trust Agreement; provided however, to the extent that the Trustee is the payor of benefits under the Plan, the plan administrator (as defined in section 414(g) of the Code) of the Plan may, subject to providing the Trustee with such information as the Secretary of the Treasury may require, direct the Trustee to withhold applicable federal income taxes under and in accordance with section 3405 of the Code; and provided further, in addition to such responsibilities as stated herein, the Employer and the Trustee may agree that the Trustee shall have the ministerial function of maintaining Participants' accounts in accordance with information, interpretations, and directions from the Administrator. The Trustee shall have no discretionary responsibility for the administration of the provisions of the Plan.

5.3 Court Approval. At no time during the administration of this Trust shall the Trustee be required to obtain any court approval of any act required of it in connection with the performance of its

duties or in the performance of any act required of it, in the administration of its duties as Trustee. The Trustee shall have full authority to exercise its judgment in all matters and at all times without court approval of such decisions; provided, however, that if any application to or proceeding or action in the courts is made, only the Employer and the Trustee shall be necessary parties, and no Participant in the Plan or other person having an interest in the Plan shall be entitled to any notice or service of process. Any judgment entered in such proceeding or action shall be conclusive upon all persons claiming an interest under the Plan.

5.4 Rights of Reliance by the Trustee.

(a) Counsel. The Trustee may consult with legal counsel (who may be of counsel to the Employer) concerning any question which may arise with reference to its duties under this Trust Agreement.

(b) Directions, Statements, and Certificates. The Employer shall furnish the Trustee from time to time with a written list of those persons authorized to give directions, statements, or certificates to the Trustee, and the Trustee shall be entitled to rely upon such list and shall not be charged with notice of any change with respect thereto until the Employer shall have furnished the Trustee with a new written list evidencing such change. The Trustee shall be entitled to rely upon any direction, statement, certificate, or other communication believed by it to be genuine and to be from the Employer or any such person to the full extent permitted by law.

(c) Plan Qualification. The Employer shall furnish the Trustee with copies of all determination letters from the Internal Revenue Service relating to the qualification of the Plan under section 401 of the Code, and the Trustee may rely upon such letters.

5.5 Bond. The Trustee shall not be required to give any bond or any other security for the faithful performance of its duties under this Trust Agreement, except such as may be required by a law which prohibits the waiver thereof.

ARTICLE 6

RESIGNATION, REMOVAL AND SUCCESSION OF THE TRUSTEE

6.1 Resignation and Removal. A Trustee may be removed by the Employer at any time by notice in writing to the Trustee. The Trustee may resign at any time upon sixty (60) days' notice in writing to the Employer. Within thirty (30) days after such removal or resignation, the Trustee shall file with the Employer a written report setting forth all investments, receipts and disbursements and other transactions effected by the Trustee since the end of the preceding Trust Year. Such report shall contain an exact description of all securities and property purchased and sold, the cost or net proceeds of sale (excluding accrued interest paid or received) and shall further indicate such assets held to such date of removal or resignation, together with the cost of each item thereof, as carried on the books of the Trustee.

6.2 Successor. Upon removal or resignation of the Trustee, but in no event more than sixty (60) days thereafter, the Employer shall designate and procure acceptance by, a successor trustee to act hereunder with the same powers and duties as those conferred upon the removed or resigning Trustee. Upon such designation, and upon the written acceptance of such successor, the resigning or removed Trustee shall assign, transfer and pay over to such successor the assets then constituting the Plan Assets; provided, however, that the resigning or removed Trustee is authorized to reserve such sum of money (and for that purpose to liquidate such property as may be necessary to produce such sum) as may seem advisable for payment of all proper charges against the Plan Assets including proper and reasonable expenses in connection with such resignation or removal, and any balance of such reserve remaining after the payment of such charges shall be paid over to the successor. Upon the payment and delivery to any successor of all the Plan Assets, and after full settlement of accounts, the responsibilities of the resigning or removed Trustee shall terminate.

ARTICLE 7

AMENDMENT AND TERMINATION

7.1 Amendment.

(a) This Trust Agreement may be amended by the Employer and the Trustee in accordance with the amendment procedures set forth in (b) below. Any amendment may be made effective retroactively if necessary to bring the Trust into conformity with

governmental regulations which must be complied with in order to make the Plan or Trust eligible for tax benefits. No amendment shall operate to deprive any Participant or beneficiary of any vested rights or benefits accrued to him prior to such amendment, nor shall any amendment or modification cause or authorize any part of the Plan Assets to revert to or be refunded to the Employer, except as otherwise provided in the Plan and consistent with ERISA.

(b) Any amendment of this Trust Agreement on behalf of the Employer shall be by action of the Fifth Third Bank Pension and Profit Sharing Committee or by the Director of Legal/Human Resources of the Bank. If an amendment is being made by the Committee, it must be approved by a majority of the members of the Committee as constituted at the time of adoption of the amendment. Any amendment approved in accordance with this paragraph may be given retroactive effect as determined by said Committee or the Director of Legal/Human Resources, as the case may be. An amendment must be in writing, duly executed and acknowledged by the Director of Legal/Human Resources or an individual with authority from said Committee to execute the amendment on behalf of the Employer and by a trust officer on behalf of the Trustee.

7.2 Termination.

(a) This Trust Agreement and the Trust created hereby may be terminated at any time by the Employer and upon such termination, the Plan Assets shall be paid out by the Trustee as and when directed by the Administrator pursuant to Section 2.2.

(b) Upon such termination of the Trust in whole or in part, the Trustee shall have a right to have its accounts settled.

(c) When the Plan Assets shall have been applied or distributed as provided herein, then the Trustee shall be released and discharged from all further accountability or liability respecting the Plan Assets (or that part of the Plan Assets so applied or distributed if the Trust is terminated only in part) or any part thereof so applied or distributed and shall not be responsible in any way or to any person for the further disposition of the Plan Assets (or that part of the Plan Assets so applied or distributed, if the Trust is terminated only in part) or any part thereof so applied or distributed.

ARTICLE 8

MISCELLANEOUS

8.1 Headings. The headings are for reference only. In the event of a conflict between a heading and the content of a Section, the content of the Section shall control.

8.2 Gender and Number. Except when otherwise indicated by the context, the genders of pronouns and the singular and plural numbers of terms shall be interchangeable.

8.3 Governing Law. This Trust shall be deemed to be an Ohio trust and shall in all respects be construed and regulated by the laws of the State of

Ohio, except where such laws are preempted by the Code or by ERISA.

8.4 Successors. This Trust Agreement shall be binding upon, and the powers herein granted to the Employer and the Trustee, respectively, shall be exercisable by the respective successors and assigns of the Employer and the Trustee. Any corporation which shall, by merger, consolidation, purchase or otherwise, succeed to substantially all the trust business of the Trustee, upon such succession and without any appointment or other action by any person, shall be and become successor trustee hereunder.

8.5 Participant's Interest. Except as otherwise provided in the Plan or this Trust Agreement, no Participant or beneficiary under the Plan shall have any interest in or right to the Plan Assets and, to the full extent of all applicable laws, the assets of this Trust shall not be subject to any form of attachment, garnishment, sequestration, or other actions afforded creditors of any Participant or beneficiary.

8.6 Severability. In case any provision of this Trust Agreement shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of this Trust Agreement, and this Trust Agreement shall be construed and interpreted as if such illegal or invalid provision had never been a part of it.

IN WITNESS WHEREOF, the parties have caused this Trust Agreement to be executed by their duly authorized officers as of the day and year first above written.

FIFTH THIRD BANK (In its fiduciary capacity to act as Trustee) as the Trustee
/s/ _____

FIFTH THIRD BANK (In its individual corporate capacity) as the Employer
/s/ _____

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 25 2013
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No. 12-751

IN THE
Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*
Petitioners,

v.

JOHN DUDENHOEFFER, *et al.*
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Robert A. Long, Jr.
John M. Vine
Covington & Burling LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004
(202) 662-6000

James E. Burke*
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
Keating Muething &
Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
Counsel for Petitioners

November 25, 2013

* Counsel of Record

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Pursuant to Supreme Court Rule 15.8, petitioners submit this Supplemental Brief to address new points raised in the Brief for the United States as *Amicus Curiae*.

I. The Government Agrees That The First Question Presented Warrants Review

A. The government agrees with petitioners that the courts of appeals are split over the proper application of the presumption of reasonableness in cases alleging that an ESOP fiduciary has violated the duty of prudence. U.S. Br. 14-16, 19. The government also agrees that this case is an appropriate vehicle to resolve these important and recurring questions. *Id.* at 18-19. Accordingly, the government recommends that the Court grant review of the first question presented. *Id.* at 9.

In the short time since the Petition was filed, the Seventh Circuit has joined the Second, Third, Fifth, Sixth, Ninth and Eleventh Circuits in holding that the presumption of reasonableness applies to an ESOP fiduciary's decision to remain invested in employer stock. *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 988-91 (7th Cir. 2013); *see In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 253-56 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1279 (11th Cir. 2012). As the government recognizes, however, the courts of appeals "have diverged on two interrelated subsidiary questions: what a plaintiff must show to

rebut the presumption, and at what stage in the proceedings the plaintiff must make that showing." U.S. Br. 14.

Six circuits require a plaintiff to plausibly allege "the viability of the company was threatened or the employer's stock was in danger of becoming worthless" in order to overcome the presumption of reasonableness. *White*, 714 F.3d at 994; *Citigroup*, 662 F.3d at 140; *Edgar v. Avaya*, 503 F.3d 340, 348-49 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 254-256; *Quan*, 623 F.3d at 882; *Lanfear*, 679 F.3d at 1282. Five circuits have held that the presumption applies at the pleading stage. *Citigroup*, 662 F.3d at 139-40; *Edgar*, 503 F.3d at 349; *Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2003); *White*, 714 F.3d at 990-91; *Lanfear*, 679, F.3d at 1281. Only the Sixth Circuit "has departed from the other circuits in both respects." U.S. Br. 15. *See Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 592-93, 595 (6th Cir. 2012).

The government and petitioners agree the Court's review is warranted to "resolve this conflict of authority to ensure that lower courts and plan administrators understand the legal duties of ESOP fiduciaries." U.S. Br. 19.

B. While the government agrees that this Court should resolve the conflict among the courts of appeals regarding petitioners' first question presented, it asks the Court to consider an additional question as well: whether ESOP fiduciaries should *ever* be accorded a presumption of reasonableness. U.S. Br. 19. This question was not raised in the court below, and there is no circuit conflict on this issue – all seven circuits that have decided the question have held that ESOP fiduciaries

are entitled to a presumption of reasonableness. For these reasons, the additional question posed by the government does not warrant review.

The government asks the Court to rule that "courts should not apply a presumption that an ESOP fiduciary has acted prudently at any stage of the proceedings." U.S. Br. 19. Neither respondents nor the government raised this issue in the court of appeals. Instead, the government argued only that under the "flexible presumption" of reasonableness adopted by the Sixth Circuit in *Kuper*, "courts reasonably require plaintiffs to show that prudence dictated a different investment decision 'under the circumstances then prevailing.'" Sec. of Labor Br. 10-11, 16 (July 14, 2011) (quoting 29 U.S.C. §1104(a)(1)(B)). The government's request for review thus disregards the principle that this Court ordinarily does not decide questions that were neither raised nor decided in the court below. *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). It also departs from the Court's usual practice of refusing to decide questions raised only by an *amicus curiae*. *See, e.g., United States v. Dion*, 476 U.S. 734, 746 (1986).

Moreover, as the government admits, there is no conflict in the circuits on the additional question it asks this Court to decide. U.S. Br. 13-14. Granting review of this question would therefore require the Court to depart from its longstanding directive that review "will only be granted for compelling reasons," such as a conflict in the courts of appeals "on the same important matter." Sup. Ct. R. 10. Because the seven courts of appeals to have addressed the issue have uniformly held that the presumption of

reasonableness applies to an ESOP fiduciary's decision to remain invested in employer stock, the government's proposed additional question does not warrant the Court's review.

C. The uniform position of the courts of appeals is sound. Contrary to the government's assertion, the presumption of reasonableness does not rest "largely on policy considerations that extend beyond ERISA's text." U.S. Br. 11.

ERISA fiduciaries are required to discharge their duties "with the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent man *acting in a like capacity* and familiar with such matters would use in the conduct of an enterprise *of a like character and with like aims*." 29 U.S.C. § 1104(a)(1)(A) (emphasis added). This statutory language clearly provides that the prudence of a fiduciary's conduct is determined not in the abstract, but in a context that includes the provisions of the plan. *See* 29 U.S.C. § 1104(a)(1)(D) (requiring fiduciaries to discharge their duties in accordance with plan documents insofar as such documents are consistent with ERISA).

By authorizing and encouraging the formation of ESOPS, Congress recognized that ESOP provisions are valid plan *characteristics* and *aims* that fiduciaries should take into account under 29 U.S.C. § 1104(a)(1)(A). "[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570, n.10 (1985). (citing S. Rep. No. 93-127,

p. 29 (1973) ("The fiduciary responsibility section, in essence, codifies and makes applicable to those fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Rep. No. 93-533, p. 11 (1973) (same)).

The seven courts of appeals that have adopted a presumption of reasonableness did so "by recognizing that when an ESOP is created, it becomes simply a trust under which the trustee is directed to invest the assets primarily in the stock of a single company." *Moench*, 62 F.3d at 571. They also recognized that "the trust serves a purpose explicitly approved and encouraged by Congress." *Id.* The presumption of reasonableness acknowledges that ESOP fiduciaries should not be subject to liability "for investing plan assets in the manner and for the purposes that Congress intended." *Id.*

If the Court were to adopt the government's position, which ignores both the statutory text of ERISA and the text and character of the plan, fiduciary responsibility with respect to employer stock plans would become a high-wire act. ERISA places ESOP fiduciaries on a "razor's edge" with its "simultaneous demands to comply with plan documents and to exercise prudence in choosing investment options for plan participants." *White*, 714 F.3d at 990. These dual requirements have led seven courts of appeals to agree that ESOP fiduciaries should be afforded "significant deference when their prudence is being challenged." *Id.* Without the presumption of reasonableness, "the duty of prudence would leave fiduciaries exposed to liability based on 20-20 hindsight for mere swings in the market or other foreseeable circumstances in which

reasonable fiduciaries and other investors could easily disagree about the better course of action." *Id.*

* * *

The Court's review of Petitioners' first question presented is warranted. Review of the government's proposed additional question is not warranted, but in any event the presumption of reasonableness is valid and supported by the text of ERISA.

II. The Second Question Presented Warrants This Court's Review

The government urges the Court to deny review of the second question presented, concerning respondents' disclosure claim, on the grounds that (a) there is no conflict of authority among the circuits and (b) the Sixth Circuit's ruling is correct. U.S. Br. 20. Petitioners disagree with the government on both grounds and urge the Court to review the second question.

A. The government's position is based on an erroneous description of respondents' claim. According to the government, respondents allege that petitioners violated their fiduciary duties "by *knowingly* providing misleading information to participants about Fifth Third's financial condition through plan documents." U.S. Br. 5 (emphasis added). Respondents' claim, however, is not so limited. Respondents allege more broadly that petitioners failed to provide complete and accurate financial information regarding Fifth Third's financial condition – not that they did so knowingly. *See, e.g.*, Complaint ¶¶5, 245. Respondents claim that petitioners are liable for breaches of their duties

of loyalty and prudence because they "knew or should have known" of the misleading statements made in SEC filings that were incorporated into plan documents. *See* Complaint ¶¶ 97, 187-193.

The court of appeals recognized that respondents were not claiming *only* that petitioners intentionally misled plan participants and held that respondents' "*knew or should have known*" allegations were sufficient to state an ERISA misrepresentation claim. *See* Pet. App. 5-6, 16 ("Significantly, a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements were made *negligently or intentionally*.") (emphasis added) (internal quotations omitted). The Ninth Circuit recently joined the Sixth Circuit on this issue. *Harris v. Amgen, Inc.*, No. 10-56014, 2013 U.S. App. LEXIS 21503, at *45 (9th Cir. Oct. 23, 2013) (finding sufficient plaintiffs' allegations that "the defendants knew or should have known that statements contained in these filings, incorporated by reference into the [summary plan descriptions ('SPDs')], were materially false and misleading.")

By contrast, the Second and Seventh Circuits have ruled that a fiduciary who prepared a SPD would be liable for statements in SEC filings incorporated into the SPD by reference *only if* the fiduciary *knew* that the statements were false. *Rhinehart v. Akers*, 722 F.3d 137, 153 (2d Cir. 2013); *In re GlaxoSmithKline ERISA Litig.*, No. 11-2289-cv, 2012 U.S. App. LEXIS 18552, at *9 (2d Cir. Sept. 4, 2012); *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605, 611 (2d Cir. 2011); *Howell v. Motorola, Inc.*, 633 F.3d 552, 571 (7th Cir. 2011) ("[P]laintiffs do not point to any intentionally

misleading statement issued by [defendants]. To the extent that they argue that the defendants negligently misrepresented information [] in their SEC filings, that negligence would not be enough to show a violation of ERISA's disclosure duty.")

B. If the Court declines to review the second question presented, the fiduciaries of employee stock plans will be in an untenable position. Because ERISA provides for nationwide service of process, and an action can be brought in the district (a) where the plan is administered, (b) where the breach took place, or (c) where a defendant resides or may be found, (29 U.S.C. § 1132(e)(2)), fiduciaries of employee stock plans throughout the country will be subject to conflicting standards of liability, contrary to the text and objectives of ERISA. *See* 29 U.S.C. § 1144(a), (b)(2), (d) (ERISA preempts state law, but not any federal law or state securities laws); *Conkright v. Frommert*, 559 U.S. 506, 517 (2010); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (Congress sought to avoid "a patchwork scheme of regulation").

The circuit split described above, involving the Sixth, Ninth, Second, and Seventh Circuits, will account for only part of that confusion. In addition, the Fifth and Eleventh Circuits have taken a different point of view and have ruled that a plan fiduciary is not liable for material misstatements in SEC filings where the filings were incorporated into plan prospectuses, but not incorporated into SPDs, and distributed by the fiduciary to plan participants. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1273, 1284 (11th Cir. 2012). There is

no reason why fiduciary liability should turn on this distinction without a difference.

The Secretary of Labor has added to this confusion. In the regulation under section 29 U.S.C. § 1104(c), the Secretary emphasized that the regulation neither requires a fiduciary to disclose material nonpublic information to the general public nor requires disclosure of such information to plan participants if disclosure would violate the securities laws. *See* 29 C.F.R. § 2550.404c-1(c)(2)(ii); 57 Fed. Reg. 46,923 (Oct. 13, 1992). Although petitioners do not rely on § 1104(c) as a defense in this case, there is no reason to think that the § 1104(a) disclosure standards are more exacting than the § 1104(c) standards. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 571 (7th Cir. 2011) ("[N]or, for that matter, do we see why the disclosure required of Plan fiduciaries under ERISA generally should be different than that required in order for fiduciaries to take advantage of section 404(c).")

In a brief as *amicus curiae* in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), the Secretary argued that "a company and its officers do not become ERISA fiduciaries by filing SEC forms, such as the Form 10K or Form 10Q, which all companies that issue stock to the public are required to file. That is true even if the securities filings are distributed by others to plan participants *or incorporated by reference into plan documents*." *See* Sec. of Labor Br. 4 n.2 (Aug. 16, 2006) (emphasis added) (internal citation omitted). More recently, in *Kopp v. Klein*, No. 12-10416, 2013 U.S. App. LEXIS 13879 (5th Cir. July 9, 2013), the Secretary took a conflicting position: that a fiduciary can be liable

regardless of whether the SEC filings are incorporated into the plan's SPDs. *See* Sec. of Labor Br., Part II (Aug. 15, 2012).

Review by this Court is necessary to prevent fiduciaries from being subjected to conflicting standards of liability.

C. Contrary to the government's assertion, the Sixth Circuit's ruling is erroneous. ERISA imposes comprehensive disclosure obligations regarding employee benefit plans; it does not impose disclosure obligations regarding corporate securities. *See* 29 U.S.C. Part 1 of Title 1 ("Reporting and Disclosure").

Public companies are subject to carefully delineated corporate disclosure laws. Congress, perceiving the need to protect companies against "strike suits," has amended the securities laws to (i) revise the requirements that plaintiffs must meet in order to be able to bring securities class action litigation alleging misrepresentation, and (ii) require such class action suits to be brought under the federal securities laws. ERISA should not be used as a vehicle for an end-run around such requirements. *See Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) ("[I]f we were to create a new fiduciary duty, as plaintiffs request, we run the risk of disturbing the carefully delineated corporate disclosure laws. We decline to do so here where there is no well-pleaded allegation of intent to deceive the plan participants."); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) (SLUSA enacted to prevent end-run around PSLRA); *Lander v. Hartford Life & Annuity Co.*, 251 F.3d 101, 107 (2001) (PSLRA intended to prevent "strike suits").

When Congress imposed disclosure obligations in other parts of ERISA, including 29 U.S.C. Part 4 of Title 1 (governing fiduciary responsibility), it did so explicitly. Congress did not authorize the courts to create disclosure requirements under ERISA that it did not include in the text of ERISA, and that could overlap and conflict with the carefully delineated disclosure requirements imposed by the securities laws, including the securities law prohibitions on selective disclosure and insider trading. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *Bd. of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146-47 (2d Cir. 1997); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007).

Petitioners were not acting as fiduciaries in preparing the SEC filings and incorporating them into SPDs. The SEC filing requirements are not imposed by ERISA on fiduciaries; they are imposed by the securities laws on issuers. *See* 15 U.S.C. § 77e; 17 C.F.R. § 239.16B; 17 C.F.R. § 230.428(a)(1). The securities laws impose comprehensive disclosure obligations on the issuers of publicly traded securities, including employer stock that participants may elect to purchase through their employers' employee benefit plans.

The Secretary of Labor's ERISA regulations exclude the preparation of employee communications and government-required reports from the scope of fiduciary conduct. *See* 29 C.F.R. § 2509.75-8(D-2). By treating SEC filings as fiduciary communications, merely through incorporation, the Sixth Circuit's ruling requires public companies to adopt a wholly impractical regime under which plan fiduciaries are

obligated to review and second-guess the judgment of the company's securities experts. *Cf. In re Citigroup, Inc.*, 662 F.3d 128, 145 (2d Cir. 2011) ("We are also mindful that requiring Plan fiduciaries to perform an independent investigation of SEC filings would increase the already-substantial burden borne by ERISA fiduciaries and would arguably contravene Congress's intent 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'") (quoting *Conkright*, 559 U.S. at 517). This is not what Congress intended.

By transforming SEC filings into fiduciary communications, through mere incorporation into plan documents, the Sixth Circuit has subjected statements made in SEC filings to ERISA regulation as well. The second question presented also warrants this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Robert A. Long, Jr.
John M. Vine
Covington & Burling LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004
(202) 662-6000

James E. Burke*
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
Keating Muething & Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioners

* Counsel of Record

AMICUS CURIAE BRIEF

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No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, ET AL., PETITIONERS

v.

JOHN DUDENHOEFFER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

M. PATRICIA SMITH
Solicitor of Labor
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
THOMAS TSO
Attorney
Department of Labor
Washington, D.C.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, imposes duties on fiduciaries of employee benefit plans, including a duty of loyalty to plan participants and a duty to administer the plan prudently. 29 U.S.C. 1104(a)(1). The questions presented are:

1. Whether, to state a claim that a fiduciary of an employee stock ownership plan violated the duty of prudence by continuing to invest plan assets in the employer's stock, a plaintiff must rebut a presumption that the fiduciary acted prudently by alleging that the employer faced imminent financial peril.

2. Whether a plan fiduciary can be liable under ERISA for material misstatements contained in Securities and Exchange Commission filings that are incorporated by reference into an ERISA-mandated summary plan description.

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In the Supreme Court of the United States

No. 12-751

FIFTH THIRD BANCORP, ET AL., PETITIONERS

v.

JOHN DUDENHOEFFER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted limited to the first question presented, but that question should be reformulated as provided below. See p. 19, *infra*.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, is designed to "protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). It requires every plan to be estab-

lished and maintained pursuant to a written instrument and to have named fiduciaries who have authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1).

ERISA imposes duties of loyalty and prudence on all plan fiduciaries. See 29 U.S.C. 1104(a). The statute provides that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" of the plan, and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1) and (B). In addition, for ordinary ERISA plans, the fiduciary must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). Plan participants may seek judicial redress against a fiduciary for breaches of those duties. See 29 U.S.C. 1132(a)(2) and (3); *Varity Corp.* v. *Howe*, 516 U.S. 489, 507-515 (1996).

ERISA sets forth certain exceptions to its statutory duties for fiduciaries who administer "eligible individual account plan[s]." See 29 U.S.C. 1104(a)(2). An individual account plan (more commonly known as a "defined contribution plan") is "a pension plan which provides for an individual account for each participant" and generally "for benefits based solely upon the amount contributed to the participant's account." 29 U.S.C. 1002(34); see *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008). The statute defines an eligible individual account plan to include any individual account plan that is, *inter alia*, a

"profit-sharing, stock bonus, thrift, or savings plan," or "an employee stock ownership plan [ESOP]." 29 U.S.C. 1107(d)(3)(A). An ESOP, in turn, is a defined-contribution plan that "is designed to invest primarily in qualifying employer securities" and meets certain requirements. 29 U.S.C. 1107(d)(6). An employer's stock is one type of a "qualifying employer security." 29 U.S.C. 1107(d)(5)(A).

For a fiduciary who administers an eligible individual account plan, "the diversification requirement * * * and the prudence requirement (only to the extent that it requires diversification)" of Section 1104 are "not violated by acquisition or holding of qualifying employer real property or qualifying employer securities." 29 U.S.C. 1104(a)(2). In addition, ERISA provides an exemption for eligible individual account plans to the rules that would otherwise forbid a fiduciary from causing a plan to purchase stock from the employer. See 29 U.S.C. 1106(a), 1107, 1108(e).

2. Petitioner Fifth Third Bancorp is a large financial-services company. Pet. 4. Fifth Third sponsors an individual-account retirement plan for its employees called the Fifth Third Bancorp Master Profit Sharing Plan (Plan). Under the Plan, employees make voluntary contributions from their earnings to any one of twenty different investment options, and Fifth Third matches the contributions up to four percent of each employee's salary. Pet. App. 4.

The Plan generally grants the company's Pension and Profit Sharing Committee "the discretionary authority and fiduciary duty to determine the investment funds to be made available," but provides that "in all events, the Fifth Third Stock Fund * * * shall be an investment option." Cert. Reply App. 8, 45. The

Plan designates the Fifth Third Stock Fund as an ESOP and provides that the fund must be "invested primarily in shares of common stock of Fifth Third Bancorp," although it "may also be invested in short-term liquid investments to the extent * * * desirable to accommodate the expected short-run liquidity needs of the Plan or Fund." *Id.* at 2-3, 27.[1] The Plan requires the Committee to "monitor[] [the] investment funds to determine the continued prudence of offering such funds" and to "change the investment funds available if and when it deems it prudent to do so." *Id.* at 45. The Plan, however, does not expressly state whether the Fifth Third Stock Fund is subject to the requirement for such monitoring.

Respondents, two former participants in the Plan, filed putative class actions in the United States District Court for the Southern District of Ohio against Fifth Third, its chief executive officer, the Committee, and other individuals who allegedly acted as fiduciaries of the Plan (collectively, petitioners). Respondents sued on behalf of all participants who were invested in Fifth Third stock between July 19, 2007, and September 21, 2009. Am. Compl. ¶¶ 15, 28-36, Docket entry No. 54 (Sept. 21, 2009). They alleged that petitioners had breached ERISA's duties of loyalty and prudence by continuing to invest Plan assets in Fifth Third stock via the Fifth Third Stock Fund and by failing to divest the Fifth Third stock. Pet. App. 5; Am. Compl. ¶¶ 229-244. According to the complaint, petitioners knew or should have known that the company's stock

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[1] Under Department of Labor regulations, "[a]n ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP." 29 C.F.R. 2550.407d-6(a)(4).

was excessively risky because of the company's high-risk subprime mortgage lending practices, and that its price was artificially inflated because of the company's inaccurate financial statements that failed to properly disclose those practices. Pet. App. 4-5. Respondents attributed a 74% decline in stock price, and correspondingly large losses to the Plan, to the subsequent public disclosure of the company's actual financial condition. *Id.* at 5. Respondents further alleged that petitioners had violated their duties of loyalty and prudence by knowingly providing misleading information to participants about Fifth Third's financial condition through plan documents. *Id.* at 5-6, 15-16; Am. Compl. ¶¶ 213, 245.

3. Petitioners moved to dismiss the complaint for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), and the district court granted the motion. Pet. App. 28-52. The district court believed that it was required to presume at the motion-to-dismiss stage that petitioners' decision to continue investing in Fifth Third stock was prudent. *Id.* at 37. Relying on decisions of the Third, Fifth, and Ninth Circuits, the district court held that respondents could rebut that presumption only by showing that Fifth Third was in a "dire financial predicament." *Id.* at 40-45. Although respondents alleged that Fifth Third had "embarked on an improvident and even perhaps disastrous foray into subprime lending" that "caused a substantial decline in the price of its common stock," the district court concluded that those allegations did not rebut the presumption because "Fifth Third remained a viable company throughout the class period." *Ibid.*

The district court also rejected respondents' argument that petitioners had violated their duties of loyalty and prudence by incorporating materially misleading Securities and Exchange Commission (SEC) filings by reference into the Plan's summary plan description (SPD). See Pet. App. 47-50. An SPD is a plain-English summary of participants' rights and obligations under a plan that ERISA requires to be distributed to participants. See 29 U.S.C. 1022 (2006 & Supp. V 2011). The district court held that because petitioners had not "intentionally connect[ed]" statements contained in the incorporated SEC filings to the soundness of the Fifth Third Stock Fund, those statements, even if materially misleading, could not constitute a breach of an ERISA duty. See Pet. App. 49-50.

4. The court of appeals reversed. Pet. App. 1-25. The court acknowledged that under circuit precedent, an ESOP "fiduciary's decision to remain invested in employer securities is presumed to be reasonable." *Id.* at 10-11 (citation omitted). But the court held that the "presumption 'is not an additional pleading requirement and thus does not apply at the motion to dismiss stage.'" *Id.* at 11-12 (citation omitted). Rather, because the presumption "concerns questions of fact," it cannot apply at a phase in which "the court must accept the well pled factual allegations of a complaint as true." *Id.* at 12.

The court of appeals "recognized that some circuits have reached a different conclusion and apply the presumption of reasonableness at the pleading stage." Pet. App. 12. And it further acknowledged that unlike other circuits, it has "not adopted a specific rebuttal standard that requires proof that the company faced a

'dire situation,' something short of 'the brink of bankruptcy' or an 'impending collapse.'" *Ibid.* (quoting *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 595 (6th Cir.), cert. denied, 133 S. Ct. 758 (2012)). Instead, a plaintiff need only "prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" *Ibid.* (quoting *Kuper* v. *Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)). This "unembellished standard," the court held, "closely tracks the language of [Section 1104(a)(1)(B)]," which "imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13. The court then held that respondents' allegations that petitioners were aware of information that rendered Fifth Third stock an imprudent investment but had continued to invest in the stock, causing losses to respondents' retirement accounts, were sufficient to state a claim. *Id.* at 15.

The court of appeals also held that petitioners could be liable under ERISA for misleading statements made in SEC filings incorporated into the SPD by reference, a question that "[n]o circuit court ha[d] answered." Pet. App. 15-24. Because petitioners had "exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock," the court explained, any misstatements contained in the incorporated filings would constitute a breach of an ERISA duty. *Id.* at 22-23.

DISCUSSION

Petitioners seek review of the court of appeals' decision declining to apply a judge-made presumption that they acted reasonably (and thus prudently) in continuing to invest plan assets in Fifth Third's ESOP. Because the courts of appeals are divided over when such a presumption applies and what showing is required to rebut it, this Court should grant review. But in the view of the United States, ERISA's text and purposes do not call for application of a presumption at any stage of the proceedings. Rather, ESOP fiduciaries are governed by the duty of prudence in Section 1104(a) just as other ERISA fiduciaries are, except that they cannot be held liable for concentrating plan assets in qualifying employer securities on the ground that the investment is insufficiently diversified.

Petitioners also seek review of the court of appeals' holding that statements contained in documents incorporated by reference into an SPD are fiduciary communications. Further review of that holding is not warranted. No circuit has shielded plan fiduciaries from liability for misleading statements contained in documents incorporated by reference into an SPD. See Pet. App. 20.

A. The First Question Presented Warrants This Court's Review

The courts of appeals are divided over what a plaintiff must plead and prove to establish that an ESOP fiduciary has violated the duty of prudence imposed

by ERISA.[2] This Court should grant review to resolve that conflict of authority.

1. a. ERISA requires a plan fiduciary to "discharge his duties * * * with the care, skill, prudence, and diligence" that "a prudent man" would exercise under similar circumstances. 29 U.S.C. 1104(a)(1)(B). Congress drew that standard from the "objective prudent person standard developed in the common law of trusts." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (*St. Vincent*); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). The prudent-person standard "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *St. Vincent*, 712 F.3d at 716 (citation omitted; brackets in original).

In the ordinary case, therefore, to state a claim based on losses resulting from imprudent plan investments, a complaint must "allege[] facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *St. Vincent*, 712 F.3d at 718 (quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128, 141 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012)); see also *id.* at 735 (Straub, J., dissenting in part) (same). As the court of appeals found, respondents' complaint satisfies that standard.

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[2] Some courts have applied the presumption only to ESOP fiduciaries, while others have applied it to fiduciaries of all eligible individual account plans. See *Peabody* v. *Davis*, 636 F.3d 368, 374 n.6 (7th Cir. 2011) (citing cases).

Pet. App. 15. Indeed, respondents plausibly allege not only that petitioners failed to conduct an adequate investigation, but also that, due to their positions within the company, they knew (or reasonably should have known) that Fifth Third stock was significantly overvalued and yet failed to take action to protect participants. *Id.* at 13-14. Knowingly investing plan assets in a significantly overvalued asset is unquestionably imprudent.

At subsequent stages of this case, of course, respondents will bear the burden of substantiating their allegations with evidence produced during discovery or otherwise, such as documents indicating what petitioners knew (or should have known) about the company's undisclosed problems and what steps they took to investigate the prudence of continued investment in Fifth Third stock. But respondents' well-pleaded, plausible allegations suffice to state a claim.

b. Petitioners argue that a special presumption that they acted prudently should apply at the motion-to-dismiss stage because this case involves an ESOP, and therefore the complaint should be dismissed because it lacks "plausible allegations that [Fifth Third] was in a dire situation, or that its viability was threatened." Pet. 3. Petitioners contend that the court of appeals "impermissibly disregarded the *ESOP-specific* exemptions included in ERISA when it applied an ordinary prudent man standard." Pet. 23.

The text of the statute does not support petitioners' position. The exemptions to which petitioners advert—in particular, the exemptions from the duty to diversify investments and from the duty of prudence "only to the extent that it requires diversification," 29 U.S.C. 1104(a)(2)—eliminate the specific requirement

that a plan's investment portfolio be sufficiently diversified to minimize risk. They do not suggest that a plaintiff must prove that the employer was in a "dire situation" in order to state a claim for breach of the basic duty of prudence. Indeed, the text of ERISA indicates the opposite: By preserving the duty of prudence for ESOPs *except* insofar as it requires diversification, Congress expressed its intent that the same general standard of prudence would govern ESOP fiduciaries as other ERISA fiduciaries.

Petitioners appear to view any allegation that an ESOP fiduciary acted imprudently by investing in employer stock as logically indistinguishable from a claim that the fiduciary failed to diversify plan assets. That view is mistaken. The exemption merely absolves ESOP fiduciaries from the ordinary obligation to reduce risk by spreading plan assets among multiple prudent investments. It does not permit them to concentrate plan assets in an *imprudent* investment.

c. The courts of appeals that have imposed a presumption of prudence have rested it largely on policy considerations that extend beyond ERISA's text and are unconvincing in their own right. Courts have, for example, perceived a conflict between the duty of prudence and plan documents requiring or encouraging fiduciaries to offer employer stock as an investment option. See *Citigroup*, 662 F.3d at 137; *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 249, 253-255 (5th Cir. 2008). But the statute itself resolves that conflict by mandating that fiduciaries follow plan documents only "insofar as such documents and instruments are consistent with" ERISA's fiduciary duties and other requirements—obligations that sensibly take precedence over the specific directives in

plan documents. 29 U.S.C. 1104(a)(1)(D); see also 29 U.S.C. 1110(a); S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973).

Some courts have expressed the concern that without a presumption of prudence, a fiduciary who is also a corporate insider might be forced to violate the securities laws by engaging in transactions on behalf of the plan based on material nonpublic information. See, *e.g.*, *White* v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013). Even if that concern were well-founded, the presumption of prudence would not resolve it, because even under petitioners' view there would still be some cases in which continuing to invest in employer stock would violate the duty of prudence (*e.g.*, where the company is in "dire" financial straits for reasons not disclosed to the public). But in any event, although plan fiduciaries who have undisclosed inside knowledge about the company cannot trade on that information on behalf of plan participants, they may take other lawful actions to protect the participants, such as publicly disclosing the inside information. See *Kopp* v. *Klein*, 722 F.3d 327, 340 (5th Cir. 2013); *Harris* v. *Amgen, Inc.*, No. 10-56014, 2013 WL 5737307, at *13-*14 (9th Cir. Oct. 23, 2013).

Petitioners assert that without a presumption of prudence, "ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates." Pet. 12. That assertion is exaggerated. As respondents appear to concede (Br. in Opp. 23), a plaintiff cannot state a claim merely because the company or industry was suffering financial difficulties. See, *e.g.*, *DiFelice* v. *U.S. Airways, Inc.*, 497 F.3d 410, 422-424 (4th Cir. 2007) (finding that fiduciaries acted prudent-

ly under the statutory standard in investing in employer stock); *Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1, 9-10 (1st Cir. 2009) (finding that fiduciaries acted prudently in selling employer stock after conducting investigation). But in a case like this one, in which it is plausibly alleged that petitioners knew (or should have known) that the stock price was significantly inflated due to market misrepresentations or could have ascertained that fact from a proper investigation, no statutory basis exists to provide fiduciaries with a "substantial shield" against liability. *Kirschbaum*, 526 F.3d at 256.

ERISA's basic policy objectives, in fact, counsel against a judicially fashioned presumption that ESOP fiduciaries have acted prudently. Non-diversified retirement plans like ESOPs put "retirement assets at much greater risk than does the typical diversified ERISA plan." *Moench* v. *Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) (citation omitted), cert. denied, 516 U.S. 1115 (1996). That is all the more reason to steadfastly enforce ERISA's other protections, including its basic duty of prudence, that Congress has not seen fit to relax for ESOPs. Particularly given the Department of Labor's considered, longstanding view that the presumption contravenes the objectives of ERISA,[3] and the lack of any textual basis for it, courts should not erect that artificial hurdle to enforcement of ERISA's protections. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944).

2. a. The seven circuits to consider the question have held that, where the terms of either an eligible individual account plan generally or an ESOP specifi-

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[3] See, *e.g.*, Secretary of Labor Amicus Br. 9-23, *Moench*, *supra* (No. 94-5637).

cally "require or encourage the fiduciary to invest primarily in employer stock," a fiduciary who continues to invest in employer stock "is entitled to a presumption that he has been a prudent investor." *Harris*, 2013 WL 5737307, at *9 (9th Cir.); see *Citigroup*, 662 F.3d at 138 (2d Cir.); *Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 346-347 & n.11 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 255 (5th Cir.); *Kuper*, 66 F.3d at 1457-1459 (6th Cir.); *White*, 714 F.3d at 988-991 (7th Cir.); *Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267, 1277-1279 (11th Cir. 2012).

The courts, however, have diverged on two interrelated subsidiary questions: what a plaintiff must show to rebut the presumption, and at what stage in the proceedings the plaintiff must make that showing. Six circuits have held that a plaintiff must show that the fiduciary knew or should have known that the employer faced a "dire situation" financially, *Edgar*, 503 F.3d at 348-349 & n.13—or put another way, that the company's "viability as a going concern was * * * threatened," or its "stock was in danger of becoming essentially worthless," although not necessarily that it was "about to collapse," *Kirschbaum*, 526 F.3d at 255-256. See *Citigroup*, 662 F.3d at 140-141; *White*, 714 F.3d at 994-995; *Quan* v. *Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010); *Lanfear*, 679 F.3d at 1282. Under that view, the "presumption is very difficult to overcome." *Rinehart* v. *Akers*, 722 F.3d 137, 148 (2d Cir. 2013). To prove that the fiduciaries managed the plan imprudently, it is "not * * * enough for plaintiffs to prove that the company's stock was not a 'prudent' investment." *Quan*, 623 F.3d at 882.[4]

[4] The Seventh Circuit has also permitted plaintiffs to allege "extreme risks imposed upon participants by fiduciaries that outweigh

Three of those circuits have stated, however, that courts should apply a sliding-scale approach under which "judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries" over investment decisions. *Citigroup*, 662 F.3d at 138; see *Kirschbaum*, 526 F.3d at 255; *Quan*, 623 F.3d at 883.

Those same circuits, with the exception of the Ninth Circuit (which has not resolved the question), have further held that the presumption applies at the motion-to-dismiss stage. See *Citigroup*, 662 F.3d at 139-140; *Edgar*, 503 F.3d at 349; *Kopp*, 722 F.3d at 339; *White*, 714 F.3d at 990-991; *Lanfear*, 679 F.3d at 1281. They have reasoned that because the presumption of prudence is "a standard of review applied to a decision made by an ERISA fiduciary, * * * [w]here plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss." *Citigroup*, 662 F.3d at 139.[5]

The Sixth Circuit has departed from the other circuits in both respects. As the decision below explained, in the Sixth Circuit, "an ESOP plaintiff c[an] 'rebut th[e] presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" Pet. App. 12 (emphasis omitted) (quoting

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the flexibility of a plan that allows employees to select from among a variety of investment options." *White*, 714 F.3d at 994.

[5] Contrary to respondents' assertion (Br. in Opp. 16), the Third Circuit held in *Edgar* that the presumption of prudence applies at the motion-to-dismiss stage. See 503 F.3d at 349. It found the complaint insufficient to rebut the presumption because it did not allege "the type of dire situation which would require [fiduciaries] to disobey the terms of the Plan by not offering [employer] stock." *Id.* at 348.

Kuper, 66 F.3d at 1459). Given that a plaintiff ordinarily bears the burden of proof for a breach-of-fiduciary-duty claim, that standard does not on its face appear to differ materially from the standard that applies to such a claim involving an ordinary ERISA plan. The Sixth Circuit has nevertheless described its standard as imposing a "demanding burden." *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 595, cert. denied, 133 S. Ct. 758 (2012). It does not, however, require proof that the employer faced "dire circumstances" at the time of the investment in employer stock. *Ibid.*

Because the Sixth Circuit has conceived of the presumption as an evidentiary principle that "concerns questions of fact," it does not require plaintiffs to plead facts rebutting it. Pet. App. 11-12; see *Pfeil*, 671 F.3d at 592-593. Rather, the Sixth Circuit has framed the presumption as merely a framework for weighing the evidence of the fiduciary's allegedly imprudent investment. For that reason, the court has found it important to afford plaintiffs the "opportunity to conduct formal discovery." *Id.* at 595.

b. Respondents contend (Br. in Opp. 12-13) that no conflict exists because in each of the decisions applying the presumption of prudence at the pleading stage, "the plan directed the fiduciaries to invest in employer stock," whereas in this case "the Plan gave petitioners full authority to cease investing in or divest the employer's stock." That argument is mistaken. As an initial matter, at least four courts of appeals, including the court below, have acknowledged the conflict of authority. See Pet. App. 12; *Kopp*, 722 F.3d at 338; *White*, 714 F.3d at 991; *Lanfear*, 679 F.3d at 1281 n.16; see also *Rinehart*, 722 F.3d at 145. The

Sixth Circuit in this case, moreover, ascribed no legal significance to whatever discretion the Plan affords petitioners. And no circuit has suggested that the existence of discretion would convert the presumption from a standard of review into an evidentiary principle.

In any event, not all of the precedents from other circuits relied on mandatory plan terms to apply the presumption of prudence. In *Kopp*, for example, the Fifth Circuit held that "regardless of whether the [fiduciaries] had discretion to cease permitting new Fund investments in [employer] stock or liquidate Fund investments in [employer] stock, the 'presumption of prudence' applies at the motion to dismiss stage." 722 F.3d at 336. Likewise, in *Lanfear*, the Eleventh Circuit concluded that "[t]he Plan did provide the defendants with some discretion," in that "it did not require th[e] [employer stock] fund to be invested exclusively in [employer] stock," but nevertheless applied the presumption to affirm the dismissal of the plaintiffs' complaint. 679 F.3d at 1277, 1282.

The Second and Ninth Circuits have concluded that the presumption applies unless the Plan does not even *encourage* a fiduciary to invest plan assets in employer stock. See *Taveras* v. *UBS AG*, 708 F.3d 436, 445-446 (2d Cir. 2013); *Harris*, 2013 WL 5737307, at *9-*11. Here, however, the court of appeals did not find that the Plan conferred on fiduciaries the sort of open-ended discretion that the Second and Ninth Circuits have determined would render the presumption inapplicable. The court of appeals stated only that the Fifth Third Stock Fund is not required to be invested "*solely* in Fifth Third stock" (presumably because it permits investment in other assets for short-term

liquidity purposes, see Cert. Reply App. 27) and that its terms do "not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock fund, *as prudence dictates*." Pet. App. 4 (emphases added). See *Rinehart*, 722 F.3d at 146 ("presumption applies in full force" where plan authorizes fiduciary to curtail investments as required by ERISA duties); *Taveras*, 708 F.3d at 444 (presumption applies even if fiduciaries have "the ability to remove the company's fund from those funds available to plan investors").

Moreover, the plain terms of the Plan mirror the terms of plans that other courts of appeals have determined "strongly encourage" investment in company stock, or provide only limited discretion, by stating that "in all events, the Fifth Third Stock Fund * * * *shall* be an investment option." Cert. Reply App. 45 (emphasis added); see *id.* at 26-27 (Committee "shall direct [Fifth Third] to make available at least three investment funds in addition to the Fifth Third Stock Fund"); see also Cert. Reply Br. 4-6. Nothing in the court of appeals' opinion suggests that it viewed the Plan as the sort of purely discretionary plan that some other circuits have found not to trigger the presumption.

c. Respondents further contend (Br. in Opp. 11) that this case is not a suitable vehicle for resolving the question presented due to "the absence of a more developed factual record." That is not a sound reason to deny review, given that the question is whether respondents' complaint suffices to state a claim for breach of fiduciary duty. They also argue (*id.* at 21-22) that their complaint would not have been dismissed even under the standard adopted by other

courts of appeals, because it "did in effect allege that Fifth Third faced a 'dire situation.'" In the event that this Court concludes that the court of appeals should have applied that standard, it could remand the fact-bound question of its application to the particular allegations here.

3. This Court should resolve this conflict of authority to ensure that lower courts and plan administrators understand the legal duties of ESOP fiduciaries. For the reasons discussed above, the proper resolution is to hold that courts should not apply a presumption that an ESOP fiduciary has acted prudently at any stage of the proceedings. See pp. 9-13, *supra*. The wording of the first question presented in the petition is closely bound up with the question whether a presumption of prudence applies at all, and that question is logically antecedent to any questions concerning when such a presumption applies and what is necessary to rebut it. See *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1876 (2011) (addressing issue logically antecedent to ERISA question presented); *Varity*, 516 U.S. at 495-496 (same). To ensure adequate briefing, however, the government recommends reformulating the first question presented as follows:

1. Whether, in a suit claiming that an ESOP fiduciary violated the statutory duty of prudence, 29 U.S.C. 1104(a)(1)(B), the fiduciary should be accorded a presumption that he acted prudently.

2. If so, whether the presumption applies at the pleading stage and what a plaintiff must allege to rebut it.

B. The Second Question Presented Does Not Warrant This Court's Review

Petitioners also seek review (Pet. 25-34) of the court of appeals' holding that respondents stated a claim for breach of fiduciary duty based on material misstatements contained in SEC filings incorporated by reference into the SPD distributed to plan participants. See Pet. App. 17-23. The court of appeals' conclusion, however, was correct, and no conflict of authority exists on that issue. This Court should therefore deny review.

1. ERISA requires plan fiduciaries to create and disseminate an SPD. See 29 U.S.C. 1022, 1024 (2006 & Supp. V 2011); see also *Varity*, 516 U.S. at 504; *CIGNA*, 131 S. Ct. at 1877. Accordingly, communications contained in an SPD are made in a fiduciary capacity and can give rise to an action for breach of fiduciary duty when they contain material misrepresentations. See *Varity*, 516 U.S. at 503.

Petitioners maintain that the result should be different where, as here, an SPD does not make a misrepresentation expressly but rather directs plan participants to other documents that contain misleading statements. That rule would allow ERISA fiduciaries to make misrepresentations with impunity. The SPD here, for example, told plan participants that petitioners "can disclose important information to you by referring you to [SEC] documents" and that the "information incorporated by reference is an important part of this booklet." Pet. App. 18 (citation omitted). The obvious import of those statements was that the SEC documents contain information that petitioners intended to convey to plan participants as part of their ERISA-mandated duty to "reasonably apprise * * *

participants and beneficiaries of their rights and obligations under the plan" in an SPD. 29 U.S.C. 1022(a). The statements contained in the SEC filings therefore should be treated as if they were contained in the SPD itself. See 11 Richard A. Lord, *Williston on Contracts* § 30:25, at 304 (4th ed. 2012) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument.").

2. a. Petitioners contend that the decision below conflicts with decisions of this Court holding that "a fiduciary is not liable under ERISA for actions taken in a non-ERISA capacity." Pet. 26 (citing *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000)). The court of appeals, however, expressly acknowledged that principle, and it concluded, based on respondents' concession, that "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 16-17. But the court determined that the act of incorporating SEC statements into an SPD—a document ERISA requires to be provided to plan participants—is a fiduciary act. Petitioners also argue that the holding below is "irreconcilable" with *Varity* (Pet. 27), where this Court held that company officers had acted in a fiduciary capacity when making misleading statements to plan participants at an employee meeting. See 516 U.S. at 498-505. But *Varity* supports the court of appeals' holding, because the Court determined that the meeting was a fiduciary act in part by analogizing it to an SPD. See *id.* at 502-503 (citing 29 U.S.C. 1022, 1024(b)(1)). Petitioners' argument (Pet. 29) that the statements here were not "intentionally connected" to the Plan ignores that the

very purpose of an SPD is to apprise participants of their rights under a plan.

b. Petitioners also contend that the court of appeals' holding conflicts with decisions of the Second, Fifth, and Eleventh Circuits. See Pet. 29-34. As the court of appeals recognized, however, no conflict exists. See Pet. App. 20.

In *Kirschbaum*, for example, the Fifth Circuit held that incorporating SEC filings into a stock fund prospectus, which comprised documents that the securities laws required the employer to distribute to plan participants, was not a fiduciary act. See 526 F.3d at 256-257. A stock fund prospectus, unlike an SPD, is not an ERISA-mandated communication to plan participants. Most pertinently, the Fifth Circuit found the case "easily distinguishable" from a district-court decision holding that a plan fiduciary could be liable for breach of fiduciary duty for misleading statements incorporated by reference into a prospectus that the employer had designated as the SPD. See *ibid.* (distinguishing *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 869 (S.D. Tex. 2004)). The Eleventh Circuit's decision in *Lanfear* similarly held that the defendants were not acting as ERISA fiduciaries when they created and distributed stock prospectuses that incorporated SEC filings, reasoning that the defendants "were conducting business that was regulated by securities law and not by ERISA." See 679 F.3d at 1283-1284.

Contrary to petitioners' contention, the Second Circuit's decision in *Gearren* v. *McGraw-Hill Cos.*, 660 F.3d 605 (2011), cert. denied, 133 S. Ct. 476 (2012), strongly suggested that a fiduciary who prepared an SPD would be liable for statements in SEC filings

incorporated by reference if he knew that the statements were false. See *id.* at 611. And in any event, the Second Circuit has recently confirmed that it "agree[s]" with the Sixth Circuit that defendants "act[] as ERISA fiduciaries when they incorporate[] [the employer's] SEC filings into the SPD distributed to plan-participants." *Rinehart*, 722 F.3d at 152. The Ninth Circuit has also now reached the same conclusion. See *Harris*, 2013 WL 5737307, at *16-*17.

3. In their reply brief (at 10 n.3), petitioners argue, contrary to the evident understanding of the court of appeals, that respondents' complaint does not sufficiently allege that the Plan SPD incorporated SEC filings by reference. If true, that deficiency would render this case an unsuitable vehicle to resolve the question whether the "incorporation of SEC filings by reference into a SPD is a fiduciary activity" (Pet. 25), even if that issue otherwise warranted review.

CONCLUSION

The petition for a writ of certiorari should be granted only on the first question presented.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
THOMAS TSO
Attorney
Department of Labor

NOVEMBER 2013

AMICUS CURIAE BRIEF

No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,

Petitioners,

v.

JOHN DUDENHOEFFER, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* KEYCORP IN SUPPORT OF PETITIONERS

DANIEL R. WARREN
Counsel of Record
SCOTT C. HOLBROOK
JAMES A. SLATER, JR.
BAKER & HOSTETLER LLP
PNC Center, Suite 3200
1900 East Ninth Street
Cleveland, Ohio 44114
dwarren@bakerlaw.com
(216) 621-0200

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF THE *AMICUS CURIAE*

KeyCorp respectfully submits this brief under Supreme Court Rule 37.2(a) as *amicus curiae* in support of petitioner seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

KeyCorp is a bank holding company headquartered in Cleveland, Ohio. Approximately 30,000 employees and former employees of KeyCorp and its affiliate entities participate in the company's 401(k) retirement plan. Many of these individuals have chosen to invest a portion of their plan accounts in KeyCorp stock. Since 2008, several former employees have brought alleged class actions against KeyCorp and several of its senior officers based on ERISA claims very similar to those asserted against petitioner here. *See Taylor v. KeyCorp, et al.*, Case No. 08-cv-1927 (N.D. Ohio, Aug. 11, 2008) (consolidated); *Metyk v. KeyCorp, et al.*, Case No. 10-cv-2112 (N.D. Ohio, Sept. 22, 2010) (consolidated).

The first named plaintiff in *Taylor* received an unsolicited phone call to file the lawsuit. *Taylor v. KeyCorp*, 2010 WL 3702423, at *3 (N.D. Ohio Aug.

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[1] Consistent with Supreme Court Rule 37.2(a), counsel for petitioners and respondents both received timely notice and consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than KeyCorp made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

12, 2010). Discovery ultimately revealed she had made a profit investing her plan account in KeyCorp stock during the proposed class period. *Id.* A second named plaintiff never invested her plan account in KeyCorp stock, and subsequently refused to participate in the case. *Id.* at *1, n.1. Following dismissal of the *Taylor* action for lack of constitutional standing, plaintiffs' attorneys found two new plaintiffs to file an identical lawsuit. This new action, *Metyk*, remains pending.

The consequences of this manufactured litigation are real. KeyCorp files this *amicus* brief because the Sixth Circuit—in direct conflict with the several other courts of appeal that have addressed these same issues—has made it far too easy for plaintiffs to get a meritless claim under ERISA past the pleading stage. By unnecessarily exposing companies to the risk, disruption and expense of protracted litigation, the Sixth Circuit's decision thwarts Congress's clear intent to protect a company's ability to provide its employees with the opportunity to have an ownership stake in the company for which they work.

STATEMENT

Many 401(k) retirement plans contain an employee stock ownership plan ("ESOP") component through which the company's employees are able to invest their plan accounts in company stock. Congress codified ESOPs and "enacted a number of laws designed to encourage employers to set up such plans" because "[l]inking worker pay to company performance is thought to increase worker

productivity and company loyalty. . . ." *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 880 n.7 (9th Cir. 2010); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983) (ESOPs "expand[] the national capital base among employees—an effective merger of the roles of capitalist and worker"); *Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) ("[T]he concept of employee ownership constituted a goal in and of itself.").

Plaintiffs' class actions attorneys have recently inundated the federal courts with ERISA cases alleging companies and their plan fiduciaries breached their duties merely by providing plan participants with the option of investing in company stock. *See, e.g., In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 687 (W.D. Tex. 2008) (noting "more than fifty [recent] court decisions in cases alleging breaches of fiduciary duties after an employer's stock significantly declined"). These cases are always filed after a decline in the company's stock price, and their universal theme is that the plan's fiduciaries should have foreseen the drop and protected the participants from losses associated with it. They are generically referred to as "ERISA stock-drop" cases.

These cases typically follow a uniform playbook. One count of the complaint is a "prudence" claim, alleging company stock was such a bad investment during the proposed class period that the plan's fiduciaries were required to forcibly liquidate participant holdings and bar any further purchases. A second count is typically a "misrepresentation" claim, alleging the company made misstatements in its securities filings, which are purportedly

"fiduciary communications" actionable under ERISA merely because these filings were incorporated by reference into plan documents.

The plaintiffs in these ERISA stock-drop cases, with the benefit of hindsight, broadly challenge the defendant's prior business practices that allegedly caused the stock-price decline at issue. Discovery is therefore wide-ranging and expensive. The potential liability can also be daunting. For large companies with thousands of 401(k) participants, company stock holdings often run into the hundreds of millions of dollars, if not more. If the company's stock price loses value, as happened to the majority of publicly-traded companies during the recent economic crisis, these companies become a ready target for substantial class action litigation.

Recognizing that Congress's intent was to encourage employee ownership, not punish it, the other courts of appeal had recently imposed two important limitations on such claims. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1280, 1284 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140, 145 (2d Cir. 2011); *Quan*, 623 F.3d at 882; *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256-57 (5th Cir. 2007); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 348-49 (3d Cir. 2007).

First, applying the so-called "*Moench* presumption," *see id.*, 62 F.3d at 571, these courts have held that an ESOP fiduciary cannot be held liable for failing to take the drastic measure of liquidating company stock from the plan, unless the plaintiffs have pleaded facts demonstrating the

company was in truly dire circumstances. *See In re Citigroup*, 662 F.3d at 140-41; *Quan*, 623 F.3d at 882. These courts further held this presumption should be applied at the motion-to-dismiss stage, so as not to require defendants to endure sprawling and costly litigation where the plaintiff's claims have no chance of succeeding. *See Lanfear*, 679 F.3d at 1281; *Edgar*, 503 F.3d at 349.

Second, these courts refused to hold ESOP fiduciaries liable under ERISA for alleged misstatements contained in their company's securities filings, merely because these filings were incorporated by reference into plan documents, as required by the federal securities laws. *See In re Citigroup*, 662 F.3d at 145; *Kirschbaum*, 526 F.3d at 257; *see also Gearren v. The McGraw Hill Cos., Inc.*, 660 F.3d 605, 611 (2d Cir. 2011) (same).

The Sixth Circuit rejected both of these positions. As for the prudence claim, the court—in effect ignoring the fact ERISA exempts ESOP fiduciaries from the duty to diversify plan assets—held that ERISA "imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." Pet. App. 13 (emphasis in original). Further magnifying this error was the court's refusal—contrary to every other circuit court to decide the issue—to apply the *Moench* presumption on the pleadings. *Id.* at 11-12.

The Sixth Circuit also allowed plaintiffs' misrepresentation claim to go forward, despite the fact that this claim was based solely on alleged misstatements in Fifth Third's securities filings.

Pet. App. 22. This holding—which creates a direct conflict with the Second, Fifth, and Eleventh Circuits—dramatically expands ERISA liability, and carves a gaping hole in the strict limitations Congress has placed on securities fraud claims.

This Court should review the Sixth Circuit's decision because it makes it too easy for plaintiffs in this circuit to surpass the important bulwark of a motion to dismiss, merely by alleging that ESOP fiduciaries should not have allowed plan participants even to have the choice of investing in company stock—a choice that Congress intended to protect and encourage. Fifth Third's petition presents an important opportunity for this Court to make it plain to companies, wherever they are located, that they can continue to allow their employees to invest in company stock without facing constant and undue risk of liability as the company's stock price inevitably rises and falls over time.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION THREATENS CONGRESS'S EMPLOYEE OWNERSHIP GOALS BY TREATING ESOPS LIKE CONVENTIONAL RETIREMENT PLANS.

A. Congress first passed legislation encouraging the formation of ESOPs forty years ago, as part of the Regional Rail Reorganization Act of 1973. *See* 45 U.S.C. § 716(e)(3) (requiring re-organization plan to set forth "the manner in which employee stock ownership plans may . . . be utilized for meeting the capitalization requirements of the Corporation"); *see*

also 45 U.S.C. § 702(7) (defining ESOP as "a technique of corporate finance . . . designed to build beneficial equity ownership of shares in the employer corporation into its employees").

Since that time, Congress has frequently enacted legislation reinforcing its policy of promoting employee investment in company stock. *See, e.g.*, Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975) (providing ESOPs with corporate tax credit); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1590 (1976) (increasing allowable tax deductions for ESOP contributions); Economic Recovery Tax Act, Pub. L. No. 97-34, 95 Stat. 172 (1981) (making interest paid on loans from ESOP fully deductible); Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (providing tax incentives for lenders making loans to ESOPs and tax deductions for dividends passed through to ESOP participants); Small Business Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (permitting S corporation shareholders to participate in ESOPs); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (expanding provisions allowing deductions for dividends paid on reinvested ESOP stock); American Job Creations Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (permitting S corporations to use distributions on stock held by plan to repay loans used to acquire stock).

ERISA remains the foundation for this legislative effort, because the statute expressly exempted ESOP fiduciaries from many of the restrictions that it otherwise applied to pension plan fiduciaries. For

example, the statute excludes ESOPs from the requirement that a pension plan may not hold more than 10 percent of its assets in employer securities. *See* 29 U.S.C. § 1107(b). Indeed, the statute *requires* ESOPs to be "primarily" invested in employer securities, *see id.* at § 1107(d)(6), and it expressly permits ESOPs to invest *all* their holdings in company stock. *Id.* at § 1107(b)(2)(iii).[2]

More importantly, ERISA exempts ESOP fiduciaries from any duty to diversify plan assets. ERISA generally requires a pension plan fiduciary to "discharge his duties . . . with the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity . . . would use," 29 U.S.C. § 1104(a)(1)(B), including to "diversify[] the investments of the plan so as to minimize the risk of large losses." *Id.* at § 1104(a)(1)(C). But ERISA specifically exempts ESOP fiduciaries from this requirement. *See* 29 U.S.C. § 1104(a)(2) ("the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is *not* violated by acquisition or holding of . . . qualifying employer securities . . . .") (emphasis added); *see also* H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, 5097 (1974) ("In recognition of the special purpose of [eligible] individual account plans . . . the

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[2] ERISA also exempts ESOPs from the statute's prohibited transaction provisions for purchases of company stock, so long as these purchases are made for "adequate consideration." 29 U.S.C. § 1108(e); *see also* 29 U.S.C. § 1002(18) (defining adequate consideration to mean "the price of the security prevailing on a national securities exchange").

diversification requirements of [ERISA] and any diversification principle that may develop in the application of the prudent man rule is not to restrict investments by eligible individual account plans in qualifying employer securities. . . .").[3]

B. The purpose of ERISA's diversification exemption is to insulate ESOP fiduciaries from liability for doing precisely what Congress intended them to do—permitting employees to invest their plan accounts in company stock. As the Ninth Circuit correctly recognized, "If there is no duty to diversify ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (quotation omitted); *see also Kirschbaum*, 526 F.3d at 249 (dismissing claim that plan became "too heavily weighted" in company stock); *Lanfear*, 679 F.3d at 1278 ("ESOP fiduciaries are exempt from the duty to diversify; indeed, they have a duty not to diversify.").

Thus, the relevant question for ERISA prudence claims like these is not whether the plan held too

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[3] An ESOP is a type of "eligible individual account plan" (EIAP), all of which are exempted from the duty to diversify. *See* 29 U.S.C. § 1107(d)(3)(A). For ease of reference, both EIAPs and ESOPs are referred to as "ESOPs" for purposes of this brief. *See, e.g., In re Citigroup ERISA Litig.*, 662 F.3d 128, 139 (2d Cir. 2011) (holding presumption of prudence applies equally to ESOPs and EIAPs); *Howell v. Motorola*, 633 F.3d 552, 568-70 (7th Cir. 2011) (same).

much company stock, but whether the fiduciaries breached their obligations by allowing plan participants to invest in "even one share" of it. *See Kirschbaum*, 526 F.3d at 249 (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 638-39 (N.D. Ohio 2009) ("Plaintiffs admit that their prudence claim is not that Defendants breached their fiduciary duty by failing to diversify the Plan, but that they breached their fiduciary duty by permitting any participant to have the option of holding or investing in even one share of KeyCorp stock after December 31, 2006, when Key common stock was an excessively risky vehicle for retirement savings.") (quotation omitted).

Accordingly, to prevail on such a claim, plaintiffs have to prove an extreme proposition—that the company stock had become such an ill-advised investment that the plan fiduciaries were required to liquidate every single share then held by plan participants, and prohibit those participants from buying any additional shares going forward.

Recognizing the drastic nature of such a claim, the Second, Third, Fifth, Ninth, and Eleventh Circuits have all held ESOP fiduciaries cannot be held liable for continuing to invest plan assets in company stock except in the most dire of circumstances. *In re Citigroup*, 662 F.3d at 140 (holding that "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms"); *Quan*, 623 F.3d at 882 (plaintiff must make allegations that "clearly

implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement") (quotations omitted); *Kirschbaum*, 526 F.3d at 255 (rejecting alleged imprudence claim where there was "no indication that REI's viability as a going concern was ever threatened, nor that REI's stock was in danger of becoming essentially worthless"); *Edgar*, 503 F.3d at 348 (dismissing claim where plaintiff's allegations did not indicate the "type of dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option"); *see also Lanfear*, 679 F.3d at 1280 (plaintiff must show "the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate") (quotation omitted).

The Sixth Circuit, however, did not embrace this standard. Rather than require plaintiffs to meet a specific standard to prove ESOP fiduciaries acted imprudently by continuing to permit investment in company stock, the court offered only a vague, general formulation—that plaintiffs must "prove that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12 (quotation omitted). Thus, the court continued, "if a 'prudent man acting in a like capacity and familiar with such matters' would not have undertaken that conduct at issue, then an ESOP or any other fiduciary may not do so regardless of whether a dire situation, pending

bankruptcy, or impending collapse exists." *Id.* at 13 (quoting 29 U.S.C. § 1104(a)(1)(B)). The Sixth Circuit held this "unembellished standard makes sense," because ERISA imposes "identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13 (emphasis in original).

Finally, the Sixth Circuit gave ERISA stock-drop plaintiffs a free pass to expensive and disruptive discovery, by ruling that this "presumption of reasonableness" cannot be applied on a motion to dismiss. *Id.* at 13; *but cf. In re Citigroup*, 662 F.3d at 139 ("Where plaintiffs do not allege facts sufficient to establish an abuse of discretion, there is no reason not to grant a motion to dismiss.").

In making these holdings, the court ignored the fact ERISA specifically carves out the duty to diversify from an ESOP fiduciary's duty of prudence. The court also ignored the host of practical problems its "unembellished standard" creates, all of which generate powerful incentives to discontinue the use of ESOPs in this circuit—an outcome directly at odds with Congressional intent. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (1976) (urging courts not to make employee ownership goals unattainable through "rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.").

To begin with, the Sixth Circuit's decision puts ESOP fiduciaries "in the untenable position of having to predict the future of the company's stock performance." *Kirschbaum*, 526 F.3d at 256. Unlike the Sixth Circuit, the other courts of appeal have recognized that without a strong standard to protect ESOP fiduciaries from liability, these fiduciaries would have to "play" the stock market and liquidate massive amounts of company stock any time they feared the stock price might be headed for a fall. But as the Fifth and Ninth Circuits have correctly noted, "the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops." *Id.* at 254; *see also Quan*, 623 F.3d at 882 (same).

And that is only where the fiduciaries' dilemma starts. If fiduciaries forcibly liquidate an ESOP and the company's stock price then increases, they would "face liability for that caution." *See Edgar*, 340 F.3d at 349 (quotation omitted). Indeed, fiduciaries have been sued under ERISA for doing exactly that. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 3 (1st Cir. 2009) (fiduciaries sued for divesting company stock at "imprudently low price"); *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636, 639 (4th Cir. 2004) (fiduciaries sued for liquidating employer stock fund from 401(k) plan).

Moreover, the drastic step of liquidating an ESOP would almost certainly do more harm than good. With the benefit of hindsight, plaintiffs in these cases allege their plan fiduciaries should have liquidated their ESOPs of what in many cases is hundreds of millions of dollars of company stock,

typically when it is trading at near-peak prices. *See Dudenhoeffer v. Fifth Third Bancorp, et al.*, Case No. 1:08-cv-538, Consol. Compl. (ECF # 54) ¶¶ 15, 45, 186, 243 (Fifth Third stock was trading at more than $40 per share when plaintiffs allege defendants should have forcibly liquidated the plan's assets). But even if plan fiduciaries had the clairvoyance to predict future stock performance, such a substantial amount of stock could not be dumped on the market without causing a significant drop in its price, thereby harming all the company's shareholders—including the plan participants on whose behalf these cases are purportedly brought.

As the Eight Circuit has stated, it would be "fanciful" to believe ESOP fiduciaries could flood the market in this way "without creating a much more severe impact on stock price than the alleged impact [the company's] actual response caused." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (affirming grant of motion to dismiss stock-drop case); *Kirschbaum*, 526 F.3d at 256 ("[F]rom a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."); *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) (decision to eliminate company stock as investment option would be "clarion call to the investment world that the Committee lacked confidence in the value of its stock," which would have "catastrophic effect on [its] stock price."), *aff'd by Quan*, 623 F.3d 870.

The Sixth Circuit ignored these practical concerns. Departing from the thoughtful holdings of

the other courts of appeal, the Sixth Circuit adopted a vague, "unembellished" standard of review that treats ESOPs like conventional retirement plans. If allowed to stand, the Sixth Circuit's decision will raise the stakes for companies headquartered in this circuit that wish to provide their employees with the opportunity to invest in company stock—an outcome that is directly contrary to Congress's intent to encourage employee ownership.

II. THE SIXTH CIRCUIT'S DECISION IMPROPERLY SUBJECTS SECURITIES FILINGS TO FIDUCIARY STANDARDS.

A. As is true in most ERISA stock-drop cases, the plaintiffs here also assert a misrepresentation claim based exclusively on alleged misstatements contained in Fifth Third's securities filings. Pet. App. 18. The Sixth Circuit reversed the district court's dismissal of this claim and held—again contrary to every other circuit court to address the issue—that securities filings are subject to ERISA merely because they were incorporated by reference into plan documents, in this case, the plan's Summary Plan Description ("SPD"). *Id.* at 22. In so holding, the Sixth Circuit has created dangerous new precedent that allows plan participants to bring veiled securities fraud claims under the guise of ERISA, thereby eviscerating the important limitations Congress has placed on such claims.

The "threshold question" in every ERISA fiduciary duty case is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to

complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Thus, communications are actionable under ERISA only if made in a "fiduciary capacity." *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996).

Plaintiffs acknowledge their misrepresentation claim is based solely on Fifth Third's securities disclosures, which Fifth Third files pursuant to the federal securities laws.[4] Pet. App. 31, 50. The Sixth Circuit held these disclosures were actionable under ERISA because Fifth Third "chose" to incorporate by reference its securities filings into plan documents. Pet. App. 18, 22. But Fifth Third did not "choose" to incorporate these filings by reference into plan documents. Rather, the federal securities laws *require* every publicly traded company that offers its stock to employees through an employee benefit plan to incorporate these filings by reference into a prospectus given to plan participants. *See* 15 U.S.C. § 77e(a) (security must be registered with SEC to be lawfully sold); 17 C.F.R. § 239.16b (issuers may use Form S-8 to register securities "offered to its employees . . . under any employee benefit plan"); http://www.sec.gov/about/forms/forms-8.pdf (Form S-8); *see also id.* at 8-9 (Item 3. Incorporation of Documents by Reference) (requiring registrant to

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[4] *See* 15 U.S.C. § 78m (requiring filing of periodic reports as required by the SEC); 15 U.S.C. § 78o-(d) (same); *see also* 17 C.F.R. § 240.13a-1 (implementing regulation requiring issuers to file annual reports); 17 C.F.R. § 240.13a-13 (same with respect to quarterly reports); 17 C.F.R. § 240.13a-11 (same with respect to current reports). These laws further mandate the form these filings must take, and the information they must contain. *See* 17 C.F.R. §§ 249.308a, 249.310.

incorporate periodic filings by reference into prospectus provided to plan participants).

Plaintiffs allege Fifth Third, like many other companies,[5] met this obligation by providing plan participants with a combined prospectus and SPD—a practice expressly permitted by the Securities and Exchange Commission. 17 C.F.R. § 230.428(1)(ii) (Documents constituting a section 10(a) for Form S-8 registration statement) (registrant "may designate an entire document or only portions of a document as constituting part of the section 10(a) prospectus"). The mere fact that Fifth Third sent the SEC-mandated prospectus in combined form with the ERISA-mandated SPD should not magically transform its securities filings into fiduciary communications. *See Fisher v. J.P. Morgan Chase & Co.*, 469 Fed. Appx. 57, at *2 (2d Cir. May 8, 2012) ("The only false or misleading statements identified by plaintiffs are in SEC filings that plaintiffs contend were incorporated into the Plan's Summary Plan Description. ERISA, however, holds fiduciaries liable solely to the extent that they were acting as a fiduciary . . . when taking the action subject to the complaint.") (quotation omitted).

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[5] *See In re Bausch & Lomb Inc. ERISA Litig.*, 2008 WL 5234281, at *8 (W.D.N.Y. Dec. 12, 2008) ("[T]he securities laws require that Plan Participants are offered access to SEC filings that are provided to potential purchasers or owners of the company stock. This requirement is usually fulfilled by incorporating by reference a company's SEC filings into the plan's prospectus/SPD.").

This is the same position the Department of Labor has taken in prior litigation: "The Secretary agrees that a company and its officers do not become ERISA fiduciaries by filing SEC forms, such as the Form 10K or Form 10Q, which all companies that issue stock to the public are required to file. . . . That is true even if the securities filings are distributed by others to plan participants or incorporated by reference into plan documents." *Kirschbaum v. Reliant Energy, Inc.*, No. 06-20157, Brief of Secretary of Labor, Elaine L. Chao, In Support of Plaintiffs-Appellants at pg. 4, n.2 (Aug. 17, 2006).

B. The Sixth Circuit's decision to create new potential ERISA liability based solely on a company's securities filings is misguided. If the defendants did in fact issue false or misleading filings, then plan participants, along with all other shareholders, already have the right to seek relief—under the securities laws. *See Fisher v. J.P. Morgan Chase & Co.*, 703 F. Supp. 2d 374, 388 (S.D.N.Y. 2010) ("[I]f JP Morgan Chase filed 'materially false and misleading' 8-Ks, 10-Qs, and 10-Ks with the knowledge that those filings were false, JP Morgan Chase may have run afoul of the federal securities laws, but it did not violate ERISA by doing so."), *see also Gearren v. The McGraw Hill Cos., Inc.*, 690 F. Supp. 2d 254, 273 (S.D.N.Y. 2010) (same).

Moreover, permitting this claim would undermine Congress's carefully crafted laws regarding when companies can be held liable for misstatements in their securities filings. Congress has recently addressed this issue on two separate occasions—the Private Securities Litigation Reform Act of 1995 and

the Securities Litigation Uniform Standards Act of 1998. *See Demings v. Nationwide Life Ins. Co.*, 593 F.3d 486, 490-91 (6th Cir. 2010) (O'Connor, J., Ret.) (discussing statutes). And on both occasions, Congress sought to *limit*, not expand, the circumstances under which companies may be held liable. *See Demings*, 593 F.3d at 490 ("In enacting PSLRA, Congress was primarily concerned with 'nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients whom they purportedly represent.'") (quotation omitted); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) ("Proponents of the Reform Act argued that [securities fraud class action] abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors.").

If the Sixth Circuit's decision is allowed to stand, plan participants holding company stock in this circuit will have the unique right to bring additional misrepresentation claims based solely on alleged misstatements contained in securities filings. By doing so, plaintiffs and their counsel can avoid the PSLRA's heightened pleading and proof requirements. *See, e.g.*, 15 U.S.C. § 78u-4(b)(1) (complaint must identify "each statement alleged to have been misleading," and "the reason or reasons why the statement is misleading"); *id.* at (b)(2)(a) (plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"); *id.* at (b)(3)(D) (staying discovery pending motion to dismiss).

Indeed, the Sixth Circuit was careful to note that fiduciaries in the circuit can face liability under ERISA "regardless of whether [their] statements or omissions were made negligently or intentionally." Pet. App. 16 (quotation omitted); *but cf. Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1796 (2010) ("In a § 10(b) action, scienter refers to a mental state embracing intent to deceive, manipulate, or defraud.") (quotation omitted); *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011) (complaint adequately pleads scienter under PSLRA "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged") (quotation omitted).

Congress enacted the PSLRA to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, 1995 U.S.C.C.A.N. 730, 731 (1995). The Court should not allow plaintiffs' attorneys to sidestep these limitations by challenging the same purported misconduct under ERISA. This is particularly so given that the Sixth Circuit premised this substantial new potential liability on such a thin reed—the mere fact Fifth Third provided its plan participants with a combined prospectus and SPD rather than burden them with two separate documents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL R. WARREN
Counsel of Record
SCOTT C. HOLBROOK
JAMES A. SLATER, JR.
BAKER & HOSTETLER LLP
PNC Center, Suite 3200
1900 East Ninth Street
Cleveland, Ohio 44114
(216) 621-0200
dwarren@bakerlaw.com

Dated: January 22, 2013

JOINT APPENDIX

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No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX, Volume 1

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Andrew L. Zivitz
Counsel of Record
Joseph H. Meltzer
Edward W. Ciolko
Shannon O. Braden
Kessler Topaz Meltzer & Check, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

Counsel for Respondents

Petition for Writ of Certiorari filed December 14, 2012
Petition for Writ of Certiorari granted December 13, 2013

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Appendix B: Order/Judgment, United States District Court for the Southern District of Ohio, Western Division (November 24, 2010) . Pet. App. 28

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RELEVANT DOCKET ENTRIES

United States District Court,
Southern District of Ohio (Cincinnati)
No. 1:08-cv-000538-SSB-MRA

Dudenhoefer, et al. v. Fifth Third Bancorp et al.

Date Filed	#	Docket Text
08/12/2008	1	COMPLAINT filed by John Dudenhoefer against Fifth Third Bancorp, Kevin T. Kabat, Darryl F. Allen, John F. Barrett, Ulysses L. Bridgeman, James P. Hackett, Gary R. Heminger, Allen M. Hill, Robert L. Koch, II, Mitchel D. Livingston, Hendrick G. Meijer, James E. Rogers, George A. Schaefer, Jr, John J. Schiff, Jr, Dudley S. Taft, Thomas W. Traylor, Paul L. Reynolds, The Pension and Profit Sharing Committee, and John Does 1-20,. (Attachments: # 1 Civil Cover Sheet, # 2 Filing Fee Receipt) (eh1,) (Entered: 08/12/2008)
* * *		
08/12/2008	2	Summons Issued as to Fifth Third Bancorp. (eh1,) (Entered: 08/12/2008)
* * *		
09/16/2008	10	SUMMONS Returned Executed by Plaintiff John Dudenhoefer,

		Defendant Fifth Third Bancorp. Fifth Third Bancorp served on 8/14/2008, answer due 9/3/2008. (Parry, Ronald) (Entered: 09/16/2008)
* * *		
10/03/2008	19	Unopposed MOTION to Consolidate Cases by Plaintiff John Dudenhoefer. (Attachments: # 1 Text of Proposed Order) (Parry, Ronald) (Entered: 10/03/2008)
10/09/2008	20	ORDER granting 19 Unopposed Motion to Consolidate Cases as follows: Case 1:08cv613 is consolidated under this case number. The case caption shall proceed forward as John Dudenhoefer, et al. v 5th 3rd Bancorp, et al. Defts' motion to consolidate ERISA litigation with pending securities case for discovery purposes filed in this case (doc. 9), shall be treated as if it was filed in the consolidated action and shall apply to both case 1:08cv538 & 1:08cv613. Pltf's response to the motion (doc. 9) is due 11/3/08. Pltf's are to file a consolidated complaint by 11/3/08. Response due 45 days thereafter. Signed by Chief Judge Sandra S Beckwith on 10/9/08. Case 1:08cv613 will be closed for statistical purposes. All further

		pleadings are to be filed under the consolidated case of 1:08cv538, ONLY. (mb) (Entered: 10/09/2008)
		* * *
05/15/2009	41	COMPLAINT *Consolidated* against all defendants, filed by all plaintiffs. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) (Parry, Ronald) (Entered: 05/15/2009)
		* * *
07/29/2009	51	Corporate Disclosure Statement by Defendant Fifth Third Bancorp. (Burke, James) (Entered: 07/29/2009)
		* * *
09/21/2009	54	CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATIONS filed by John Dudenhoefer and Alireza Partovipanah against Darryl F. Allen, John F. Barrett, Ulysses L. Bridgeman, Greg D. Carmichael, Fifth Third Bancorp, James P. Hackett, Gary R. Heminger, Allen M. Hill, John Does 1-20, Kevin T. Kabat, Robert L. Koch, II, Mitchel D. Livingston, Hendrick G. Meijer, Nancy Phillips, Paul L. Reynolds, James E. Rogers, George A. Schaefer, Jr, John J. Schiff, Jr,

		Robert Sullivan, Dudley S. Taft, The Pension and Profit Sharing Committee, Thomas W. Traylor, Mary Tuuk, (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) (Parry, Ronald) Modified docket text on 9/22/2009 (eh1). (Entered: 09/21/2009)
09/30/2009	55	AGREED ORDER: Defts. to file their motion to dismiss the amended consolidated class action complaint by 10/5/09; Pltfs' memo in opposition by 11/5/09; Reply due: 12/7/09. Signed by Judge Sandra S Beckwith on 9/30/09. (mb) (Entered: 09/30/2009)
10/05/2009	56	MOTION to Dismiss *Plaintiffs' Amended Consolidated Complaint* by Defendants Greg D. Carmichael, Fifth Third Bancorp, Kevin T. Kabat, Nancy Phillips, Paul L. Reynolds, Robert Sullivan, The Pension and Profit Sharing Committee, Mary Tuuk. Responses due by 11/5/2009 (Attachments: # 1 Exhibit A: Affidavit, # 2 Exhibit 1: Part 1 of 4, # 3 Exhibit 1: Part 2 of 4, # 4 Exhibit 1: Part 3 of 4, # 5 Exhibit 1: Part 4 of 4, # 6 Exhibit 2, # 7 Exhibit 3, # 8 Exhibit 4, # 9 Exhibit 5, # 10 Exhibit 6, # 11 Exhibit 7, # 12 Exhibit 8, # 13 Exhibit 9, # 14 Exhibit 10, # 15

		Exhibit B) (Burke, James) Modified on 2/16/2010 (eh1). (Entered: 10/05/2009)
* * *		
11/03/2009	58	STIPULATION AND ORDER dismissing defendants Allen, Barrett, Bridgeman, Hill, Hackett, Heminger, Koch, Livingston, Meijer, Rogers, Schiff, Jr., Taft, & Traylor ("Outside Directors Defendants). Signed by Judge Sandra S Beckwith on 11/3/09. (mb) (Entered: 11/03/2009)
11/05/2009	59	RESPONSE in Opposition re 56 MOTION to Dismiss *Plaintiffs' Amended Consolidated Complaint* filed by Plaintiffs John Dudenhoefer, Alireza Partovipanah. (Ciolko, Edward) (Entered: 11/05/2009)
12/07/2009	60	REPLY to Response to Motion re 56 MOTION to Dismiss *Plaintiffs' Amended Consolidated Complaint* filed by Defendants Greg D. Carmichael, Fifth Third Bancorp, Kevin T. Kabat, Nancy Phillips, Paul L. Reynolds, Robert Sullivan, The Pension and Profit Sharing Committee, Mary Tuuk. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Burke, James) (Entered: 12/07/2009)

	* * *	
11/24/2010	81	ORDER granting 56 Defendants' Motion to Dismiss the amended complaint. Plaintiff's request for leave to amend the complaint is denied. Signed by Judge Sandra S Beckwith on 11/24/10. (mb) (Entered: 11/24/2010)
11/24/2010	82	JUDGMENT by clerk. (mb) (Entered: 11/24/2010)
12/22/2010	83	NOTICE OF APPEAL by Plaintiffs John Dudenhoefer, Alireza Partovipanah. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Ciolko, Edward) Modified docket text on 12/23/2010 (eh1). (Entered: 12/22/2010)
	* * *	
09/16/2011	86	NOTICE by Defendants Darryl F. Allen, John F. Barrett, Ulysses L. Bridgeman, James P. Hackett, Gary R. Heminger, Allen M. Hill, Robert L. Koch, II, Mitchel D. Livingston, Hendrick G. Meijer, James E. Rogers, John J. Schiff, Jr, Dudley S. Taft, Thomas W. Traylor, Plaintiffs John Dudenhoefer, Alireza Partovipanah *of Agreement to Extend Expiration Date of Tolling Agreement* (Gyandoh, Mark) (Entered: 09/16/2011)

09/06/2012	87	ORDER and JUDGMENT of USCA as to 83 Notice of Appeal filed by John Dudenhoefer, Alireza Partovipanah: it is ORDERED that the judgment of the district court dismissing the Amended Complaint is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court. (mtw) (Entered: 09/06/2012)
		* * *
10/24/2012	90	MANDATE of USCA as to 83 Notice of Appeal filed by John Dudenhoefer, Alireza Partovipanah. (mtw) (Entered: 10/24/2012)
		* * *
10/31/2012	94	*FIFTH THIRD DEFENDANTS* ANSWER to 54 Amended Complaint,, filed by Greg D. Carmichael, Fifth Third Bancorp, Kevin T. Kabat, Nancy Phillips, Paul L. Reynolds, Robert Sullivan, The Pension and Profit Sharing Committee, Mary Tuuk. (Burke, James) (Entered: 10/31/2012)
		* * *
12/11/2012	99	Status Conference Order: counsel participated in a telephone status conf with Magistrate Judge Abel on 12/7/12; Status Report due by

		2/11/2013. Signed by Magistrate Judge Mark R. Abel on 12/11/12. (sh1) (Entered: 12/11/2012)
		* * *
12/27/2012	102	Notice from Supreme Court of the United States. The petition for a writ of certiorari was filed on 12/14/2012 and placed on the docket on 12/20/2012 as case number 12-751. (jlw) (Entered: 12/27/2012)
		* * *
02/15/2013	108	STATUS CONFERENCE ORDER: Counsel to call Judge Abel office w/in 14 days of the Supreme Court's decision of whether to hear Fifth Third's appeal to schedule another telephone conference w/ the Magistrate Judge. Signed by Magistrate Judge Mark R. Abel on 2/14/13. (sh1) Modified to clarify docket text on 2/19/2013 (mtw). Modified on 2/20/2013 (mb). (Entered: 02/15/2013)
		* * *
04/05/2013	112	STATUS CONFERENCE ORDER: on 4/4/13 counsel participated in a telephone status conf w/ Mag Judge Abel to discuss Dft's petition for writ certiorari. Signed by Magistrate Judge Mark R. Abel on 4/5/13. (sh1) (Entered: 04/05/2013)

	* * *	
04/23/2013	116	ORDER granting 103 Motion to Stay Case. Case is STAYED for 30 days. A further status conference (telephone) is scheduled for 6/4/13 at 8:30 AM. Counsel for defendants is to initiate the call to chambers. Signed by Judge Sandra S Beckwith on 4/23/13. (mb) (Entered: 04/23/2013)
	* * *	
06/04/2013	119	ORDER LIFTING STAY to the extent that defendants shall produce the hard drive/archive of documents produced in case 1:08-cv-421. This case is REFERRED to MJ Abel to establish a schedule and for any discovery disputes that may arise. Signed by Judge Sandra S Beckwith on 6/4/13. (mb) (Entered: 06/04/2013)
	* * *	
09/06/2013	120	NOTICE by Plaintiff John Dudenhoefer *of Agreement to Extend Expiration Date of Tolling Agreement* (Ciolko, Edward) (Entered: 09/06/2013)
	* * *	
12/18/2013	121	Notice from Supreme Court of the United States. The petition for a writ of certiorari was filed on and

		placed on the docket on 12/13/2013 as case number 12-751. (jlw) (Entered: 12/18/2013)

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Sixth Circuit
No. 11-3012

Dudenhoefer, et al. v. Fifth Third Bancorp et al.

01/05/2011 Civil Case Docketed. Notice filed by Appellants John Dudenhoefer and Alireza Partovipanah. Transcript needed: n. (LAJ)

* * *

01/11/2011 CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Edward W. Ciolko for Appellants John Dudenhoefer and Alireza Partovipanah Certificate of Service: 01/11/2011. (EWC)

* * *

01/19/2011 CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by Attorney Mr. Edward W. Ciolko for Appellants John Dudenhoefer and Alireza Partovipanah. Certificate of Service:01/19/2011. (EWC)

* * *

01/26/2011 CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. James E Burke, Jr. for Appellees Fifth Third Bancorp, Kevin T. Kabat, Paul L. Reynolds, The Pension and Profit Sharing Committee, Nancy Phillips, Greg Carmichael, Robert Sullivan and Mary

Tuuk Certificate of Service: 01/26/2011. (JEB)

* * *

07/07/2011 APPELLANT BRIEF filed by Mr. Edward W. Ciolko for John Dudenhoefer and Alireza Partovipanah. Certificate of Service:07/07/2011. Argument Request: requested. (EWC)

* * *

07/14/2011 AMICUS BRIEF filed by Ms. Melissa J. Moore for SOL. Certificate of Service:07/14/2011. (MJM)

* * *

07/14/2011 AMICUS BRIEF filed by Mr. Jay E. Sushelsky for AARP. Certificate of Service:07/14/2011. (JES)

* * *

09/21/2011 APPELLEE BRIEF filed by Mr. James E Burke, Jr. for Fifth Third Bancorp, Kevin T. Kabat, Paul L. Reynolds, The Pension and Profit Sharing Committee, Nancy Phillips, Greg Carmichael, Robert Sullivan and Mary Tuuk. Certificate of Service:09/21/2011. Argument Request: requested. (JEB)

* * *

10/11/2011 REPLY BRIEF filed by Attorney Mr. Edward W. Ciolko for Appellants John Dudenhoefer and Alireza Partovipanah. Certificate of Service:10/11/2011. (EWC)

* * *

06/07/2012 CAUSE ARGUED by Ms. Melissa J. Moore for Amicus Curiae SOL, Mr. Peter Houghton LeVan, Jr. for Appellants John Dudenhoefer and Alireza Partovipanah and Mr. Joseph Michael Callow, Jr. for Appellees Fifth Third Bancorp, Kevin T. Kabat, Paul L. Reynolds, The Pension and Profit Sharing Committee, Nancy Phillips, Greg Carmichael, Robert Sullivan and Mary Tuuk before Cook,Circuit Judge; Stranch,Circuit Judge and Lawson,U.S. District Judge. (KAL)

* * *

09/05/2012 OPINION and JUDGMENT filed: judgment of the district court dismissing the Amended Complaint is REVERSED and case is REMANDED, decision for publication pursuant to local rule 206. Deborah L. Cook, Jane Branstetter Stranch (AUTHORING), Circuit Judges and David M. Lawson, U.S. District Judge for the E. D. of MI. (DA)

* * *

09/19/2012 PETITION for en banc rehearing filed by Mr. James E Burke, Jr. for Fifth Third Bancorp, Kevin T. Kabat, Paul L.

Reynolds, The Pension and Profit Sharing Committee, Nancy Phillips, Greg Carmichael, Robert Sullivan and Mary Tuuk. Certificate of Service: 09/19/2012. (JEB)

10/12/2012 ORDER filed denying petition for en banc rehearing [4696583-2] filed by Mr. James E Burke, Jr.. Deborah L. Cook and Jane Branstetter Stranch, Circuit Judges; and David M. Lawson, District Judge. (BLH)

10/23/2012 MANDATE ISSUED with no costs taxed. (LAJ)

12/26/2012 U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Fifth Third Bancorp. Supreme Court Case No:12-751, 12/14/2012. (CL)

12/16/2013 U.S. Supreme Court letter filed granting the petition for a writ of certiorari as to Question 1 presented by the petition [4761490-2] filed by Fifth Third Bancorp. Supreme Court Case No: 12-751, 12/13/2013. (CL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
(WESTERN DIVISION)

Civil Action No.:1: 08cv538

[Filed September 21, 2009]

JOHN DUDENHOEFFER, ALIREZA PARTOVIPANAH, *et al.*,	)
Plaintiffs,	)
vs.	)
FIFTH THIRD BANCORP, *et al.*,	)
Defendants.	)

CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

Plaintiffs John Dudenhoeffer and Alireza Partovipanah ("Plaintiffs") allege the following based upon personal information as to themselves and the investigation of Plaintiffs' counsel, which included a review of U.S. Securities and Exchange Commission ("SEC") filings by Fifth Third Bancorp ("Fifth Third" or the "Company"), including the Company's proxy statements (Form 14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K), and the annual reports (Form 11-K) filed on behalf of the Fifth Third Bancorp Profit Sharing Plan (the "Plan"); a review of the Form 5500s filed by the

Plan with the U.S. Department of Labor ("DOL"); interviews with participants of the Plan; and a review of available documents governing the operations of the Plan. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

I. NATURE OF THE ACTION

1. This is a class action brought on behalf of the Plan, pursuant to § 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2), against the fiduciaries of the Plan for violations of ERISA.

2. The Plan is a retirement plan sponsored by Fifth Third. *See* Summary Plan Description of The Fifth Third Bancorp Master Profit Sharing Plan (as of August 8, 2007) ("2007 SPD") at FTB000257; Summary Plan Description of Fifth Third Bancorp Master Profit Sharing Plan (as of October 1, 2008) ("2008 SPD") at FTB000501. True and correct copies of the 2007 SPD and 2008 SPD are attached hereto and incorporated as Exhibit A and Exhibit B, respectively.

3. Plaintiffs' claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets during the period July 19, 2007 through the present (the "Class Period").

4. Defendants allowed the imprudent investment of the Plan's assets in Fifth Third common stock ("Fifth Third Stock") throughout the Class Period,

even though they knew or should have known that such investment was unduly risky and imprudent. The Company's serious mismanagement and improper business practices led to, *inter alia,* the artificial inflation of Fifth Third Stock and created dire financial circumstances for the Company. As a result, Fifth Third Stock was an unduly risky and inappropriate investment option for Plan participants' retirement savings during the Class Period.

5. Therefore, Plaintiffs allege in Count I that certain Defendants, each having specific responsibilities regarding the management and investment of Plan assets, breached their fiduciary duties to the Plan and Plan participants by failing to prudently and loyally manage the Plan's investment in Company securities by (1) continuing to offer Fifth Third Stock as a Plan investment option when it was imprudent to do so; (2) failing to provide complete and accurate information to Plan participants regarding the Company's financial condition and the prudence of investing in Fifth Third Stock; and (3) maintaining the Plan's pre-existing investment in Fifth Third Stock when Company stock was no longer a prudent investment for the Plan. These actions/inactions run directly counter to the express purpose of ERISA pension plans, which are designed to help provide funds for participants' retirement. *See* ERISA § 2, 29 U.S.C. § 1001 ("CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY").

6. In Count II, Plaintiffs allege that certain Defendants breached their fiduciary duties by failing to adequately monitor other persons to whom management/administration of Plan assets was

delegated, despite the fact that Defendants knew or should have known that such other fiduciaries were imprudently allowing the Plan to continue offering Fifth Third Stock as an investment option and investing Plan assets in Fifth Third Stock when it was no longer prudent to do so.

7. In Count III, Plaintiffs allege that certain Defendants failed to avoid or ameliorate inherent conflicts of interests which crippled their ability to function as independent, "single-minded" fiduciaries with the best interests of the Plan and Plan participants solely in mind.

8. In Count IV, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by knowing of breaches of fiduciary duties and failing to remedy them, knowingly participating in the breaches of fiduciary duties, and/or enabling the breaches of fiduciary duties.

9. As is more fully explained below, during the Class Period, Defendants with responsibility for the Plan's investments imprudently permitted the Plan to hold and acquire hundreds of millions of dollars in Fifth Third Stock despite the Company's serious mismanagement and improper business practices. Based on publicly available information for the Plan, Defendants' breaches have caused tens of millions of dollars of losses to the retirement savings Plan.

10. This action is brought on behalf of the Plan and seeks to recover losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). In addition to money damages, Plaintiffs seek equitable

relief from Defendants, including, without limitation, injunctive relief and constructive trust, restitution, and equitable tracing (as available under applicable law).

11. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiffs bring this action as a class action under FED. R. CIV. P. 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested in Fifth Third Stock during the Class Period.

12. In addition, because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are made by necessity upon information and belief. At such time as Plaintiffs have had the opportunity to conduct discovery, Plaintiffs will, to the extent necessary and appropriate, amend this Complaint or, if required, will seek leave to amend to add additional facts that further support Plaintiffs' claims.

II. CLASS ACTION ALLEGATIONS

13. ***Class Definition***. Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Plaintiffs and the following class of persons similarly situated (the "Class"):

14. All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between July 19, 2007 through the present, and whose accounts included investments in Fifth Third Stock.

15. ***Class Period***. The fiduciaries of the Plan knew or should have known at least by July 19, 2007, that the Company's material weaknesses were so pervasive that Fifth Third Stock could no longer be offered as a prudent investment for the retirement Plan.

16. ***Numerosity***. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to the Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs reasonably believe, based on the Plan's Form 5500 for Plan year 2007, that there are over 26,837 participants or beneficiaries in the Plan.

17. ***Commonality***. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

- whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;
- whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;
- whether Defendants violated ERISA; and
- whether the Plan has suffered losses and, if so, the proper measure of damages.

18. ***Typicality***. Plaintiffs' claims are typical of the claims of the members of the Class. Because Plaintiffs assert derivative claims on behalf of the Plan pursuant to ERISA § 502(a), Plaintiffs' claims are necessarily typical – indeed, identical – to the derivative claims of any Class member.

19. ***Adequacy***. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

20. ***Rule 23(b)(1)(B) Requirements***. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

21. ***Other Rule 23(b) Requirements***. Class action status is also warranted under the other subsections of Rule 23(b) because: (1) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (2) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (3) questions of law or fact common to members of the Class predominate over any questions affecting only individual members

and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

22. ***In the alternative, Plaintiffs seek appropriate relief under*** ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). This section of ERISA states that "[a] civil action may be brought —" "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title[.]" ERISA Section 409(a), 29 U.S.C. § 1109(a), sets forth that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable ***to make good to such plan any losses to the plan resulting from each such breach***, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by then fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

(Emphasis added). Since the statute does not distinguish in any way among the status or standing of the Secretary of Labor, a plan fiduciary or a plan participant, the statute provides no basis upon which to claim that a participant stands in procedural shoes that are different from either the Secretary or a fiduciary.

III. JURISDICTION AND VENUE

23. ***Subject Matter Jurisdiction***. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

24. ***Personal Jurisdiction***. ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All Defendants are either residents of the United States or subject to service in the United States. Therefore, this Court has personal jurisdiction over them. This Court also has personal jurisdiction over Defendants pursuant to FED. R. CIV. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of Ohio.

25. ***Venue***. Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and Fifth Third has its principal place of business in this district.

IV. PARTIES

A. Plaintiffs

26. Plaintiff John Dudenhoeffer is a resident of Collier County, Florida. He worked for Fifth Third for several years and left the Company in early 2008. He is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held Fifth Third Stock in the Plan during the Class Period.

27. Plaintiff Alireza Partovipanah is a resident of Volusia County, Florida. He worked for Fifth Third for

several years and left the Company in February 2008. He is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held Fifth Third Stock in the Plan during the Class Period.

B. Defendants

1. Fifth Third

28. ***Defendant Fifth Third***. Fifth Third is an Ohio corporation with its principal place of business at 38 Fountain Square Plaza, Cincinnati, Ohio 45263. Fifth Third is a diversified financial services company. As of March 31, 2008, Fifth Third operated 16 affiliates with 1,311 full-service Banking Centers. Fifth Third reports on five business segments: (i) Commercial Banking; (ii) Branch Banking; (iii) Consumer Lending; (iv) Fifth Third Processing Solutions (FTPS); and (v) Investment Advisors.

29. At all relevant times during the Class Period, Fifth Third had and has the power to remove the Trustee of the Plan. *See* The Fifth Third Profit Sharing Trust Agreement (as amended and restated) (the "Trust Agreement"), Article 6, § 6.1 at FTB000252 ("A Trustee may be removed by the Employer at any time by notice in writing to the Trustee"). A true and correct copy of the Trust Agreement is attached hereto and incorporated herein as Exhibit C.

30. The Trust Agreement may also be amended by the Company or the Director of the Legal/Human Resources of the Company. *See* Trust Agreement, Article 7, § 7.1(b) at FTB000253 ("Any amendment of this Trust Agreement on behalf of the Employer shall be by action of the Fifth Third Bank Pension and Profit

Sharing Committee or by the Director of Legal/Human Resources of the Bank").

31. ***Defendant Kevin T. Kabat ("Kabat")*** was, at all relevant times, Chief Executive Officer ("CEO") and President of Fifth Third. During the Class Period, Defendant Kabat was a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because he exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, he possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or he exercised authority or control with respect to the management of the Plan's assets.

2. <u>The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee</u>

32. ***Defendant The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee (the "Committee")*** was, at all relevant times, the administrator of the Plan. *See* 2007 SPD at FTB000257; 2008 SPD at FTB000501; *see also* Organization and Authority of Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee Recitals ("Fifth Third Recitals") at FTB000550 ("The Committee shall act as the 'plan administrator' as defined in the Employee Retirement Income Security Act of 1974, as amended ('ERISA'), for all Applicable Plans"). A true and correct copy of the Fifth Third Recitals is attached hereto and incorporated herein as Exhibit D.

33. Pursuant to the Fifth Third Recitals, the Committee was allocated the following power and authority:

> 2.3 The Committee shall have the power and authority in its sole, absolute and uncontrolled discretion to:
>
> (a) interpret plan provisions and to respond to questions concerning plan administration.
>
> (b) adopt and change rules for the administration and operation of the plans.
>
> (c) determine who is a participant.
>
> (d) determine the rights or benefits (if any) of any individual under the plans.
>
> (e) determine when, to whom, and in what form distributions are to be made.
>
> (f) exercise such power and authority with regard to any fund or trust fund as may be necessary or appropriate in the administration of the plans.
>
> Benefits under an Applicable Plan will be paid only if the Committee, or its delegate, decides in its discretion that the applicant is entitled to them.

* * *

2.9 The Committee shall have the authority to terminate any Applicable Plan.

See Fifth Third Recitals at FTB000550-000551.

34. During the Class Period, the Committee was comprised of the following Company employees:

(a) ***Defendant Paul L. Reynolds ("Reynolds")*** was, at all relevant times, Chairman of the Committee (*see* Minutes of the Committee Notes, dated Feb. 26, 2008 at FTB000639) and Director of Legal/Human Resources; Defendant Reynolds also signed The Fifth Third Bancorp Master Profit Sharing Plan, as amended and restated effective as of December 31, 2000 ("Plan Document") at FTB000073 and signed the Trust Agreement (*see* Trust Agreement at FTB000254). A true and correct copy of the Plan Document is attached hereto and incorporated herein as Exhibit E. During the Class Period, defendant Reynolds was a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because he exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, he possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or he exercised authority or

control with respect to the management of the Plan's assets;

(b) ***Defendant Nancy Phillips ("Phillips")*** has served as the Company's Executive Vice President and Chief Human Resources Officer since April 2008. During the Class Period, defendant Phillips was a member of the Committee. Pursuant to the Minutes of the Committee Notes, dated Aug. 26, 2008, defendant Reynolds proposed that defendant Phillips serve as the Chairman of the Committee and the Committee unanimously approved (*see* Minutes of the Committee Notes, dated Aug. 26, 2008 at FTB000761). During the Class Period, defendant Phillips was a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because she exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, she possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or she exercised authority or control with respect to the management of the Plan's assets;

(c) ***Defendant Greg D. Carmichael ("Carmichael")*** was, at all relevant times, Executive Vice President and Chief Operating Officer of the Company. During

the Class Period, defendant Carmichael was a member of the Committee and a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because he exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, he possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or he exercised authority or control with respect to the management of the Plan's assets;

(d) ***Defendant Robert Sullivan ("Sullivan")*** was, at all relevant times, Senior Executive Vice President of the Company. During the Class Period, defendant Sullivan was a member of the Committee and a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because he exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, he possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or he exercised authority or control with respect to the management of the Plan's assets; and

(e) ***Defendant Mary Tuuk ("Tuuk")*** was, at all relevant times, Executive Vice President and Chief Risk Officer of the Company. During the Class Period, defendant Tuuk was a member of the Committee and a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because she exercised discretionary authority or discretionary control with respect to the appointment of Plan fiduciaries and with respect to the management of the Plan, she possessed discretionary authority or discretionary responsibility in the administration of the Plan, and/or she exercised authority or control with respect to the management of the Plan's assets

35. Defendants Reynolds, Phillips, Carmichael, Sullivan and Tuuk are herein referred to as the "Committee Defendants."

3. Additional "John Doe" Defendants

36. Without limitation, unknown "John Doe" Defendants 1-10 include other individuals, including Company officers, directors and employees who are or were fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) during the Class Period. The identities of the John Doe Defendants are currently unknown to Plaintiff; once their identities are ascertained, Plaintiff will seek leave to join them to the instant action under their true names.

V. THE PLAN

37. The Plan, sponsored by Fifth Third, is a defined contribution plan. The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

38. The Plan is a voluntary contribution plan whereby participants make contributions to the Plan ("Voluntary Contributions") and direct the Plan to purchase investments with those contributions from options pre-selected by Defendants which are then allocated to participants' individual accounts.

39. As of December 31, 2007, Plan participants could direct their accounts to be invested in Fifth Third Stock, two collective funds or 17 mutual funds offered by the Plan as investment options. *See* Form 11-K, dated June 27, 2008 ("2008 Form 11-K") at 4.

40. The Plan is a retirement plan. *See* 2007 SPD at FTB000274 and 2008 SPD at FTB000518 ("The Plan is for your retirement"); *see also* Plan Document, Article 1, § 1.2 ("The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries").

41. In the Company's 2008 Form 11-K, the Plan is described as the following:

> ***General*** – The Plan is a defined contribution profit sharing plan, with a 401(k) feature,

> with separate accounts maintained for each participant. Each employee of a participating Fifth Third Bancorp ("Bancorp") subsidiary, if employed before November 1, 1996, automatically became a participant on the first payroll date after becoming an employee. With regard to the profit sharing feature, effective January 1, 2004, employees are eligible immediately upon hire. For the 401(k) feature, employees are eligible to participate after 30 days of service. The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Bancorp is the Plan Sponsor. The original Plan became effective December 31, 1954, and was last amended on November 8, 2007.

42. Fifth Third Bank serves as the trustee of the Plan. *See* 2008 Form 11-K at 4. However, pursuant to the Plan Document, the Plan is administered by the Committee. *See* Plan Document, Article 2, § 2.5 at FTB000005 ("'Administrator' or 'Plan Administrator' means the Fifth Third Bank Pension and Profit Sharing Committee. Members of said Committee shall be appointed by, and serve at the pleasure of, the President and Chief Executive Officer of Fifth Third Bank").

43. Pursuant to the 2008 Form 11-K:

> The Plan permits voluntary contributions from participants up to 100% of their compensation. Such contributions are credited directly to the participants' accounts and are fully vested. Contributions may be

> allocated to the available investment options at the discretion of the participant. Gains and losses under the Plan are valued on a daily basis and allocated to participant accounts based on account balances

44. Fifth Third employees are eligible to participate in the Plan after they have completed thirty (30) days of service. Fifth Third matches 100% of the first 4% of the participants' compensation contributed on a pre-tax basis. A three-year cliff vesting schedule was added to the Plan as of January 1, 2004, so that after three years of service, a participant is 100% vested in the Company matching contributions; anything less than three years of service, a participant is 0% vested. Current service credit as of January 1, 2004, was grandfathered. Company matching contributions are initially invested in the Fifth Third Stock Fund. Subsequent to the initial investment, matching contributions may be moved to the other investment options. *See* 2008 Form 11-K at 5; *see also* 2007 SPD at FTB000262 and 2008 SPD at FTB000506; 2007 SPD at FTB000270 and 2008 SPD at FTB00514 ("Employer matching contributions will be made initially into the Fifth Third Stock Fund"); Trust Agreement, § 3.4(b) at FTB00249 ("**Employer Matching Account**. Subject to the diversification rights and other relevant provisions of the Plan, the Employer Matching Accounts under the Plan shall be invested in the Fifth Third Stock Fund") (emphasis in original).

45. As of December 31, 2007 and 2006, the Plan held 4,588,460 and 4,572,430 shares of Fifth Third Stock, respectively, with fair values of $117,551,104

and $188,439,816, respectively. *See* 2008 Form 11-K at 9.

46. The Plan Document does not mandate that Fifth Third Stock Fund invest solely in Fifth Third Stock. Pursuant to the Plan Document, the Fifth Third Stock Fund "may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund." *See* Plan Document, Article 7, § 7.4 at FTB000038; *see also* Trust Agreement, § 3.4(a)(1) at FTB000248-249 ("The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund ***may also be invested in short-term liquid investments*** to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received") (emphasis added).

47. Furthermore, the Plan does not limit the ability of the Plan fiduciaries, including the Plan administrator, to remove the Fifth Third Stock Fund, or divest assets invested in the Fifth Third Stock Fund, as prudence dictates. *See* Trust Agreement, § 3.3(a) at FTB000248 ("The Administrator shall have the duty of monitoring such investment funds to determine the continued prudence of offering such funds; and the

Administrator shall change the investment funds if and when it deems it prudent to do so").

48. Pursuant to the Fifth Third Recitals, "[T]he Committee shall have the power and authority in its sole, absolute and uncontrolled discretion to: . . . exercise such power and authority with regard to any fund or trust fund as may be necessary or appropriate in the administration of the plans." *See* Fifth Third Recitals § 2.3(f), at FTB000550-551.

49. The Plan incorporates by reference the Company's SEC filings. For example, The Fifth Third Bancorp Master Profit Sharing Plan Prospectus (the "Prospectus") states in relevant part:

> The SEC allows us to incorporate by reference into this prospectus the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this prospectus, and information that we subsequently file with the SEC will automatically update and supersede information in this prospectus and in our other filings with the SEC. In other words, in case of a conflict or inconsistency between information contained in this prospectus and information incorporated by reference into this prospectus, you should rely on the information that was filed later.
>
> We incorporate by reference the documents listed below, which we have already filed with the SEC, and any documents we file

with the SEC in the future under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934 (other than information in such future filings deemed not to have been filed), until we sell all the securities offered by this prospectus:

- Annual Report on Form 10-K for the year ended December 31, 2007, as amended;
- Quarterly Reports on Form 10-Q for the quarters ended March 31, 2008 and June 30, 2008;
- Current Reports on Form 8-K filed on January 14, 2008, February 25, 2008, February 28, 2008, April 23, 2008, April 24, 2008, May 2, 2008, May 5, 2008, May 6, 2008, June 6, 2008, June 18, 2008, June 24, 2008 and June 25, 2008; and
- The description of our common stock contained in a registration statement filed under the Securities Exchange Act of 1934, including any amendment or report filed for the purpose of updating such description.

Prospectus at FTB000546-000547. A true and correct copy of the Prospectus is attached hereto and incorporated herein as Exhibit F.

50. During the Class Period, a significant amount of the Plan's assets were invested in Fifth Third Stock. As of December 31, 2007, the Plan held approximately 4,588,460 units of Fifth Third Stock, valued at its market price of over $117,551,104. *See* 2008 Form 11-K

at 9. As of December 31, 2008, the amount of Fifth Third Stock in the Plan had dwindled to $67,600,661 even though units of Fifth Third Stock had increased to 8,176,422. *See* Form 11-K, Ex. 99, filed June 16, 2009 ("2009 Form 11-K"). Following revelations that Defendants made misleading and inaccurate disclosures or failed to disclose that: (a) First Third operating expenses were rapidly increasing; (b) Fifth Third was undergoing higher loan losses due to its weakening credit quality; (c) Fifth Third was in need of a cash infusion to offset the undisclosed negative trends in loan losses; (d) Fifth Third's Non-Performing Assets were dangerously increasing; and (e) Fifth Third's Tier 1 capital base had declined precipitously and required a major infusion of capital, the price of Fifth Third Stock decreased dramatically. As of September 18, 2009, Fifth Third Stock traded at approximately $10.24 per share, representing a decline of over 74% since the beginning of the Class Period. As a result, the Plan incurred substantial losses due to its investment in Fifth Third Stock.

51. Despite the Plan's substantial investment in Fifth Third Stock, Defendants failed to protect the Plan and its participants and beneficiaries from the risks of the Company's reckless and improper conduct. Defendants continued to hold the Plan's shares of Fifth Third Stock and compounded the problem (and the losses) by purchasing additional shares during the Class Period. Plaintiffs believe losses to the Plan are in the tens of millions of dollars.

VI. DEFENDANTS' FIDUCIARY STATUS

A. The Nature of Fiduciary Status

52. ***Named Fiduciaries***. ERISA requires every plan to have one or more "named fiduciaries." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan document is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

53. ***De Facto Fiduciaries***. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary functions. *See* ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." *Id.*

54. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and the participants in the manner and to the extent set forth in the Plan's documents, under ERISA, and through their conduct.

55. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage

and administer the Plan and the Plan's investments solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

56. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan's management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the fiduciary discretion and authority assigned to or exercised by each of them, and the claims against each Defendant are based on such specific discretion and authority.

57. Instead of delegating all fiduciary responsibility for the Plan to external service providers, Fifth Third chose to delegate its responsibility regarding the administration of the Plan to the Committee. *See* Plan Document, Article 2, § 2.5 at FTB000005. Fifth Third chose to assign the appointment and removal of fiduciaries to the President of the Company (*see* Fifth Third Recitals at FTB000549), who, in turn, selected the members of the Committee. *See id.*

58. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). However, insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor.

B. Fifth Third's Fiduciary Status

59. On information and belief, in order to comply with ERISA, the Company exercised responsibility through the Committee for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner by providing participants with information and materials required by ERISA. *See, e.g.*, ERISA § 101(a)(1), 29 U.S.C. § 1101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description). In this regard, the Company and the Committee disseminated the Plan's documents and related materials, which incorporated by reference, among other things, Fifth Third's inaccurate SEC filings, thus converting such materials into fiduciary communications.

60. On information and belief, the Company is also charged with the appointment, monitoring, and removal of the Trustee and execution of the Trust documents with the Trustee to provide for the investment, management, and control of the assets of the Plan. *See* Trust Agreement, Article 6, § 6.1 at FTB000252.

61. Moreover, on information and belief, Fifth Third exercised control over the activities of its employees who performed fiduciary functions with respect to the Plan, including the Committee. In particular, Fifth Third through the CEO and President had the authority and discretion to hire, appoint, monitor, and remove the members of the Committee, as well as other officers and employees appointed by Fifth Third to perform Plan-related fiduciary functions in the

course and scope of their employment. Fifth Third had, at all applicable times, effective control over the activities of its officers and employees, including their Plan-related activities. Additionally, by failing to properly discharge their fiduciary duties under ERISA, the officer and employee fiduciaries breached duties they owed to the Plan's participants and their beneficiaries. Accordingly, the actions of the Plan's Officer and other employee fiduciaries are imputed to the Company under the doctrine of *respondeat superior*, and the Company is liable for these actions.

62. Finally, under basic tenets of corporate law, Fifth Third is imputed with the knowledge its officers and employees (including other Defendants) had regarding the misconduct alleged herein, even if such knowledge is not communicated to Fifth Third.

63. Consequently, in light of the foregoing duties, responsibilities, and actions, Fifth Third was both a named fiduciary of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and a *de facto* fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period because it exercised discretionary authority or discretionary control over the management of the Plan, exercised authority or control over the management or disposition of the Plan's assets, and/or had discretionary authority over or discretionary responsibility for the administration of the Plan.

C. Defendant Kabat's Fiduciary Status

64. The Plan documents provide that the President and CEO of the Company has the power to appoint the Committee members. *See* Plan Document,

Article 2, § 2.5 at FTB000005 ("Members of said Committee shall be appointed by, and serve at the pleasure of, the President and Chief Executive Officer of Fifth Third Bank"); *see also* Fifth Third Recitals at FTB000549. Thus, according to DOL regulations, the President and CEO exercises a fiduciary function under ERISA. 29 C.F.R. § 2509.75-8 (D-4). Further, the Plan also provides the President with the power to augment the Committee's powers and responsibilities. *See also id.* at FTB000551 ("The Committee shall have such additional powers and responsibilities as the President may determine from time to time"). Moreover, if the Committee is unable to resolve an issue, the President has the authority to do so. *Id.* at FTB000552 ("Any question that the Committee may not be able to resolve as to its authority, shall be referred to the President for determination").

65. In light of the foregoing duties and responsibilities, defendant Kabat is a *de facto* fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because he exercises discretionary authority or discretionary control over the management of the Plan, exercises authority or control over the management or disposition of the Plan's assets, and/or has discretionary authority over or discretionary responsibility for the administration of the Plan.

D. The Committee Defendants' Fiduciary Status

66. The Committee was the Plan administrator during the Class Period.

67. During the Class Period, the Company also relied on the Committee Defendants to carry out its fiduciary responsibilities under the Plan and ERISA.

As a result, the Committee Defendants are both named and functional fiduciaries under ERISA.

68. Consequently, in light of the foregoing duties, responsibilities, and actions, the Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period because they exercised discretionary authority or discretionary control over the management of the Plan, exercised authority or control over the management or disposition of the Plan's assets, and/or had discretionary authority over or discretionary responsibility for the administration of the Plan.

VII. FACTS BEARING ON FIDUCIARY BREACH

69. Fifth Third operates as a diversified financial services holding company. The Company's Consumer Lending segment is involved in mortgage and home equity lending activities, such as origination, retention, and servicing of mortgage and home equity loans; and other indirect lending activities, which include loans to consumers through mortgage brokers, automobile dealers, and federal and private student education loans. The Company's Commercial Banking segment offers banking, cash management, and financial services; traditional lending and depository products and services; other services, including foreign exchange and international trade finance, derivatives and capital markets services, asset-based lending, real estate finance, public finance, commercial leasing, and syndicated finance for business, government, and professional customers. The Company's Branch

Banking segment provides a range of deposit and loan, and lease products to individuals and corporations. Its products include checking and savings accounts, home equity loans and lines of credit, and credit cards and loans for automobile and personal financing needs. The Company's Investment Advisors segment offers a range of investment alternatives for individuals, companies, and not-for-profit organizations. This segment also offers investment, trust, asset management, retirement planning, and custody services, as well as retail brokerage services to individual clients and broker dealer services to the institutional marketplace. The Fifth Third Processing Solutions segment offers electronic funds transfer, debit, credit, and merchant transaction processing services; and data processing services.

70. As of March 31, 2009, Fifth Third operated 1,311 full-service banking centers, including 95 Bank Mart locations and 2,354 ATMs in the Midwestern and Southeastern regions of the United States.

71. Throughout the Class Period, Defendants repeatedly failed to take any steps to protect the interests of the Plan and of the Plan participants and beneficiaries. Although Defendants knew or should have known that Fifth Third Stock was both imprudent and artificially inflated because of the Company's serious mismanagement, improper business practices, and exposure to the severe problems in the mortgage and credit markets, Defendants did nothing to protect the Plan's substantial investment in Fifth Third Stock.

A. The Rise and Risk of Subprime Mortgage Lending.

72. The term "subprime" generally refers to "borrowers who do not qualify for prime interest rates because they exhibit one or more of the following characteristics: weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies; low credit scores; high debt-burden ratios; or high loan-to-value ratios." Sandra F. Braunstein, Dir., Div. of Consumer and Cmty. Affairs, Fed. Reserve Bd., *Subprime Mortgages: Testimony Before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services,* Mar. 27, 2007, http://www.federalreserve.gov/newsevents/testimony/Braunstein20070327a.htm.

73. Originating subprime mortgages had become increasingly popular in recent years – climbing from $120 billion in 2001 to $625 billion in 2005. Ruth Simon and James Hagerty, *More Borrowers With Risky Loans Are Falling Behind – Subprime Mortgages Surged As Housing Market Soared; Now, Delinquencies Mount*, Wall St. J., Dec. 5, 2006, at A1.

74. In order to take advantage of this new market, some lenders, such as Fifth Third, began weakening their underwriting standards. For example, lenders lowered the minimum credit score borrowers needed to qualify for certain loans, allowed borrowers to finance a greater percentage of their home's value, and, in some cases, allowed borrowers to carry a higher debt load (*e.g.*, "no money down"). *See* Ruth Simon, *Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep Relaxing Credit-Score, Income*

and Debt-Load Rules, Wall St. J., July 26, 2005, at D1; *see also* Noelle Knox, *43% of First-time Home Buyers Put No Money Down,* USA Today, Jan. 18, 2006, at A1.

75. In addition to lowering underwriting standards, lenders began offering novel loan products to entice borrowers. Typical subprime mortgages included:

(1) interest-only mortgages that allowed borrowers to make interest only payments for a period of years before the payments significantly increased when the principal was added;

(2) pick-a-payment loans, where borrowers chose their monthly payment (full payment, interest-only, or a minimum payment that might have been lower than the payment required to reduce the balance of the loan); and

(3) adjustable rate loans that were initially fixed but then converted to variable rates, which oftentimes were highly unfavorable.

Sandra Block, *"Pick-a-Payment" Mortgage Risks are High*, USA Today, July 18, 2005, at B3; *see also* Ruth Simon, *New Type of Mortgage Surges in Popularity – Fixed-Rate Interest-Only Loans Offer Lower Initial Payments but Delay Debt Reduction*, Wall St. J., Apr. 19, 2006, at D1.

76. These novel terms, combined with lowered lending standards, led to high rates of borrower defaults.

77. Consequently, in late 2004 and early 2005, industry watchdogs began expressing growing fears that relaxed lending practices had increased "risks for borrowers and lenders in the overheated housing markets." Simon, *Mortgage Lenders Loosen Standards*, *supra*.

78. Trouble in the housing market emerged in 2005 when home values began to decline and the Federal Reserve instituted a series of interest rate hikes, which caused the interest rates on variable rate loans, including mortgage loans, to rise. In response, "bank regulators issued their first-ever guidelines for credit-risk management for home-equity lending" in May 2005. *Id*.

79. However, most subprime lenders failed to heed these and other warnings. "Despite rising interest rates and general housing market cooling in 2005, many lenders continued to offer borrowers credit under weakened lending standards. Many lenders kept introductory 'teaser' rates low even after short-term interest rates began rising in June 2005." Simon & Hagerty, *supra*. Subprime borrowers, in particular, had difficulty meeting their monthly payment obligations after their introductory "teaser" rate expired. In addition, because housing prices were falling, borrowers could not readily re-sell their property for a profit when they could not pay their increased monthly payments, causing mortgage defaults to increase significantly.

80. By the end of 2005, foreclosures and delinquency rates had substantially risen. Simon & Hagerty, *supra*. As of October 2005, the delinquency

rate recorded on new subprime loans had doubled from a year earlier. *Id.*

81. Nonetheless, subprime mortgage exposure grew even riskier in 2006 as lenders originated a large number of no-documentation and low-documentation loans, also known as "liar loans." This practice constituted as much as 40% of subprime mortgages issued in 2006, up from 25% in 2001. Gretchen Morgenson, *Crisis Looms In Market for Mortgages*, N.Y. Times, Mar. 11, 2007, at 1. In April 2006, mortgage industry research revealed that 90% of borrowers had overstated their incomes by 5% or more and had inflated their incomes by more than half in 60% of these cases. *Id.*

82. Additionally, piggyback loans, which combined a mortgage with a home-equity loan or line of credit and allowed borrowers to finance more than 80% of their home's value without paying for private mortgage insurance, became increasingly popular, constituting approximately half of all subprime loans in 2006. *Id.* On average, borrowers financed 82% of the underlying value of their property, up 48% from 2000. *See id.*; James R. Hagerty & Ruth Simon, *Home Lenders Pare Risky Loans – More Defaults Prompt Cut in "Piggyback" Mortgages; Housing Market May Suffer*, Wall St. J., Feb. 14, 2007, at A3.

B. Published Warnings Place Plan Fiduciaries On Notice Of Need To Investigate Risks Of Subprime Exposure

83. On July 26, 2005, the Wall Street Journal warned that "[m]ortgage lenders are continuing to loosen their standards, despite growing fears that

relaxed lending practices could increase risks for borrowers and lenders in overheated housing markets." Simon, *Mortgage Lenders Loosen Standards, supra*.

84. A little over a year later, Reuters reported that "rising delinquencies and forecasts of a deepening deterioration in housing have prompted big investors, including hedge funds, to bet against subprime-related securities since late 2005." Al Yoon, *"Irrational" Mortgage Bond Prices Polarize Market*, Reuters, Sept. 25, 2006.

85. In response to the increasing risks inherent in subprime lending, "the Federal Reserve and the other banking agencies issued guidance on nontraditional mortgage products" on September 29, 2006. Testimony of Sandra L. Thompson, *supra*. The "Interagency Guidance on Nontraditional Mortgage Product Risks" sent a warning to the marketplace that bank regulators were concerned about the lessened underwriting standards and generally lax risk management practices of subprime lenders. *See* Office of the Comptroller of the Currency Board of Governors of the Federal Reserve System, *Interagency Guidance on Nontraditional Mortgage Product Risks*, Sept. 29, 2006, http://www.federalreserve.gov/boarddocs/srletters/2006/SR0615a2.pdf.

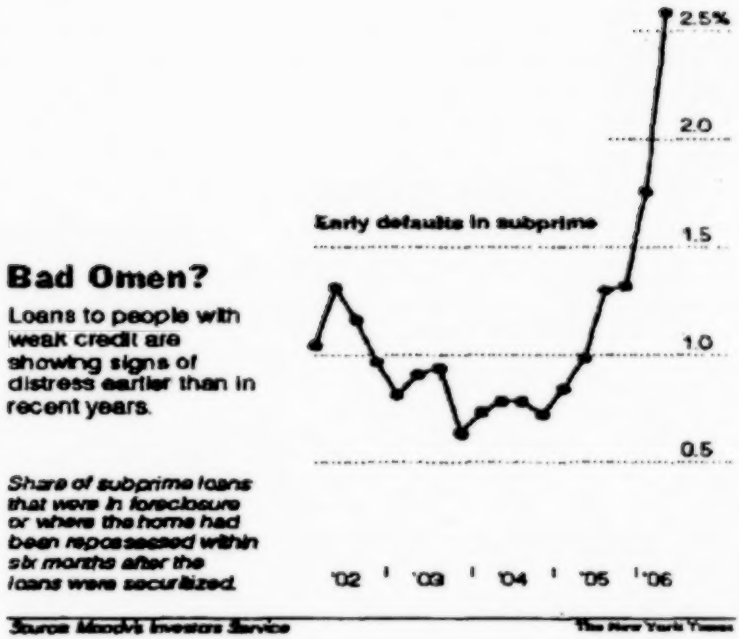
86. After experiencing a sharp increase in defaults from new borrowers, Ownit Mortgage Solutions, Inc. closed its doors in early December 2006 and filed for Chapter 11 bankruptcy just a few weeks later. E. Scott Reckard, *Demise of Ownit Mortgage Hits Home*, L.A. Times, Jan. 3, 2007, at C1.

87. The Wall Street Journal reported that in 2006 alone, roughly 80,000 subprime borrowers had fallen into delinquency, many shortly after loan origination. Simon & Hagerty, *supra*.

88. On December 20, 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market. Ron Nixon, *Study Predicts Foreclosure for 1 In 5 Subprime Loans*, N.Y. Times, Dec. 20, 2006, at C1. Shortly thereafter, several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries from the SEC and Federal Deposit Insurance Corporation ("FDIC"), and resulting in several bankruptcy filings. *Id*.

89. On January 3, 2007, Consumer Affairs published an article that warned that "as the housing market slows to a crawl, many subprime lenders are collapsing faster than homes made of substandard materials, and the signs point to even more pain in the housing market as a result." Martin H. Bosworth, *Subprime Lender Implosion: Bad Omen For Housing*, Consumer Affairs, Jan. 3, 2007, http://www.consumeraffairs.com/news04/2007/01/mln_subprime.html.

90. Indeed, by early 2007, the collapse of the subprime lending industry was well underway. "Across the industry, 2.6 percent of the subprime loans securitized in the second quarter of 2006 had been foreclosed on or repossessed within six months. That is up from 1 percent for loans securitized in the second quarter of 2005," as reflected in the chart below:



Vikas Bajaj and Christine Haugheny, *Tremors at the Door - More People With Weak Credit Are Defaulting on Mortgages*, N.Y. Times, Jan. 26, 2007, at C2.

91. On March 11, 2007, the New York Times reported that more than two dozen subprime mortgage lenders had failed or filed for bankruptcy. Morgenson, *Crisis Looms In Market for Mortgages*, *supra*.

92. Two weeks later, the Wall Street Journal reported that New Century Financial Corp. ("New Century"), the largest U.S. subprime lender, was on the "brink of bankruptcy" because it could not pay back loans it took from Wall Street banks. Gregory Zuckerman, *How Street Hit Lender – 'Subprime' King New Century Was Down but Not Quite Out; Then, Banks Shut Cash Spigot*, Wall St. J., Mar. 29, 2007, at C1.

93. Four days later, New Century filed for Chapter 11 bankruptcy. Julie Creswell and Vikas Bajaj, *Home Lender is Seeking Bankruptcy*, N.Y. Times, Apr. 3, 2007, at C1.

94. In total, from the end of 2006 through July 1, 2007, 15 mortgage companies had gone bankrupt and close to 50 more had suspended loans or closed entirely. Rick Green, *Lehman Shuts Unit; Toll of Lenders Tops 100: Subprime Scorecard*, Bloomberg.com, Aug. 23, 2007, http://www.bloomberg.com/apps/news?pid=20601206&sid=aQBUrPcefMtc&refer=realestate.

95. Despite these warnings of the dangers of subprime lending, Defendants failed to investigate the propriety of maintaining the Fifth Third Stock Fund as an investment option for the Plan.

C. Fifth Third Stock Was An Imprudent Investment For The Plan During The Class Period Because Of Serious Mismanagement, The Precipitous Decline Of The Company's Stock Price, And The Company's Rapidly Deteriorating Financial Condition

96. During the Class Period, Fifth Third was plagued by severe structural problems—including overexposure to subprime and Alt-A mortgages, failures in risk management, and a lack of sound leadership. These problems made it imprudent for the Plan's fiduciaries—who were also key leaders of the Company—to maintain the Plan's massive investment in Fifth Third Stock. Fifth Third Stock posed an unduly large risk of significant loss and this risk is not one that could be prudently borne by an employee retirement plan.

97. These risks, which Defendants knew or should have known existed, were exacerbated by incomplete and inaccurate statements issued by Fifth Third.

98. Fifth Third's faulty business model and failures in risk management, coupled with incomplete and inaccurate statements by Fifth Third executives, caused the price of Fifth Third Stock to be artificially inflated.

99. The risk of significant loss to the Plan was exacerbated by the fact that Fifth Third Stock constituted a significant amount of the Plan's total assets. Despite the profound risk the Company faced due to its exposure to the subprime mortgage crisis as well as the Company's corporate mismanagement, Defendants failed to undertake any meaningful action to protect the Plan from the massive losses that have been caused by the Plan's holding hundreds of millions of dollars of Fifth Third Stock while exigent circumstances beset Fifth Third during the Class Period. For example, Defendants continued to allow the Plan's investment in Fifth Third Stock even during the time that the stock price was declining in value as a result of collapse of the housing market. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated.

100. During the Class Period, Fifth Third Stock was an imprudent investment for the Plan participants' retirement savings. The Company suffered from business and accounting mismanagement related to its high-risk subprime exposure, which was not disclosed to the public even as it created dire financial circumstances and exposed the Plan to huge losses.

101. Moreover, this grave mismanagement and corresponding deterioration in financial condition contributed to the artificial inflation of the value of the Fifth Third Stock, further increasing the risk of loss. As the DOL, the agency charged with responsibility for enforcing ERISA, has stated, it is never prudent for a retirement plan fiduciary to purchase company stock that he knows or should know is artificially inflated. Brief of the Secretary of Labor as Amicus Curie Supporting Appellants and Requesting Reversal at 15-16, *In re Calpine Corp. ERISA Litig.*, No. 06-15013 (9th Cir. Nov. 16, 2006).

102. A fiduciary's duty of prudence under an ERISA-governed retirement plan, requires that he or she may not ignore circumstances, such as those here, that increase the risk of loss to participants and beneficiaries to an imprudent level.

103. A variety of circumstances contributed to the unacceptable level of risk borne by Plan participants as a result of the Plan's investment in Fifth Third Stock, including, but not limited to, the Company's:

(1) overexposure to loans tied to the declining housing and construction market;

(2) exposure to subprime loans through, *inter alia*, its ill-timed acquisition of First Charter Corp. which was involved in subprime residential lending;

(3) failure to implement and maintain sufficient risk management control processes;

(4) failure to properly reserve for losses;

(5) failure to properly account for and disclose its exposure to losses tied to its business operations in the subprime market;

(6) artificial inflation of Fifth Third Stock caused by these circumstances; and

(7) dire financial circumstances created by Fifth Third's subprime exposure and improper business practices.

1. Fifth Third No Longer Utilized Conservative Lending Practices

104. Despite the published warnings and other negative indicators, such as rising interest rates and a cooling housing market, Fifth Third not only failed to safeguard its own financial condition from the imminent decline in mortgage and construction financing, but also plunged toward the bottom of the deteriorating market when Fifth Third departed from its historically conservative lending practices and embarked on a Company-wide mission to grow its commercial real estate and consumer lending businesses by offering what amounted to subprime loans. This departure greatly increased Fifth Third's risk of loss by subjecting the Company to the housing market collapse.

105. Prior to 2006, Fifth Third had successfully grown its mortgage business but had not expanded into subprime lending.

106. Beginning in 2006, however, Fifth Third aggressively marketed Alt-A mortgages, 80/20 mortgages, option-ARMs, and high LTV land and

construction loans under the guise of brand names such as SimpleFlex, FLEX 53, Quick & Simple, Alt-97, and Loan Prospector. These products all had one thing in common: they disregarded borrower qualifications, particularly the borrower's income – the primary indicia of ability to repay – and instead looked to the property securing the loan for repayment in the event of a default. Moreover, by making high LTV loans to marginally qualified borrowers and developers, Defendants were betting the bank on an appreciating real estate market at a time when that market was deteriorating.

107. Fifth Third routinely issued Alt-A loans to borrowers with credit scores below the FIRC's 660 FICO score-threshold for subprime loans and carried the added risk of undocumented incomes and/or assets; unverified employment, income and/or assets; and total debt-to-income ratios of 50% or greater.

108. Furthermore, and adding even greater risk, Fifth Third's Alt-A loans were often extended with LTV ratios as high as 100% of the value of the collateral, which greatly increased the risk to Fifth Third because it left no equity to recover in the event of a foreclosure.

109. This was a business strategy that entailed a high degree of risk and should have been disclosed to Plan participants, but was not. Ultimately, Defendants' strategy proved toxic when the real estate markets continued to deteriorate at a rapid pace.

110. As the real estate market slowed in 2006 and 2007, and housing prices stagnated and then fell, the importance of loan quality came to the forefront. With home prices declining and refinancing increasingly

unavailable, borrowers' ability to pay their mortgages became critical to minimize Fifth Third's loss exposure.

111. During the Class Period, Defendants portrayed Fifth Third to the public and Plan participants as a "prime mortgage originator" that employed stringent risk management practices based on its "core principles" of "conservatism, diversification and monitoring." Moreover, in making statements concerning "prime" versus "subprime" lending, Defendants concealed from, and/or failed to disclose to, Plan participants the Company's internal working definition of "prime," which was utterly and completely inconsistent with commonly accepted definitions of the term within the banking industry.

112. In reality, Defendants had engineered the growth of the Company's mortgage lending business through aggressive marketing of Alt-A mortgage products that were characterized by precisely the same risks as subprime lending.

2. Defendants Failed to Provide the Plan's Participants, Beneficiaries, and their Co-Fiduciaries with Complete and Accurate Information about the True Risks of Investment in Fifth Third Stock in the Plan

113. The Class Period begins on July 19, 2007, when the Company issued a press release and its quarterly financial supplement announcing its earnings for the second quarter of 2007. *See* Form 8-K Submission to the SEC, filed July 19, 2007. The Company reported second quarter 2007 earnings of $376 million, or $0.69 per diluted share, compared with

$359 million, or $0.65 per diluted share, in the first quarter of 2007 and $382 million, or $0.69 per diluted share, for the same period in 2006.

114. In the July 19, 2007 press release, the Company downplayed any serious impact from the mortgage/credit crisis. Defendant Kabat stated, "Second quarter results were strong across most areas of the Company." The Company boasted of its 6% revenue growth, increase in net interest income and 8% fee growth. While acknowledging that "credit is a challenge at this point in the cycle," the Company stated that it was actively managing its credit risks and expected any credit deterioration to remain within its expectations. Defendant Kabat stated, "All told, we were pleased with our results, and remain very focused on executing on our strategic plans and building shareholder value."

115. On August 16, 2007, Fifth Third announced that it would acquire First Charter Corp., which operated 57 branches in North Carolina and 2 in suburban Atlanta, for $1.1 billion. *See* Form 8-K Submission to the SEC, filed August 16, 2007. Since 2004, First Charter Corp. had been involved in subprime residential lending. *See* Fred Tannenbaum, *New World Braves Trends*, American City Business Journals, May 21, 2004, at 1.

116. On September 11, 2007, Fifth Third made a presentation at the Lehman Brothers Financial Services Conference, wherein the Company focused on its "strong expense management" and "strong underlying performance." Additionally, Fifth Third touted its residential mortgage portfolio, noting its

average LTV, average weighted FICO scores and level of net charge-offs.

117. On October 19, 2007, Fifth Third issued a press release and its quarterly financial supplement announcing its earnings release for the third quarter of 2007. *See* Form 8-K Submission to the SEC, filed October, 19, 2007.

118. The Company reported third quarter 2007 earnings of $376 million, or $0.71 per diluted share, compared with $376 million, or $0.69 per diluted share, in the second quarter of 2007 and $377 million, or $0.68 per diluted share, for the same period in 2006.

119. The Company again downplayed the impact of the mortgage market crisis upon its financial condition, stating that, despite significant market disruption during the quarter, "t]hird quarter results were solid" and the Company was "spared most of its effects."

120. Defendant Kabat stated that, while credit continued to be a challenge during the quarter and the Company expected some deterioration in credit trends in the near future, the deterioration would be manageable: "Overall, we were pleased with our results given the macro environment in this kind of quarter and continue to execute our strategic plans."

121. The 2007 Third Quarter Earnings Release attached to the October 19, 2007 press release further stated:

> Provision for loan and lease losses totaled $139 million in the third quarter, exceeding net charge-offs of $115 million, compared

> with $121 million last quarter and $87 million in the same quarter last year. The allowance for loan and lease losses represented 1.08 percent of total loans and leases outstanding as of quarter end, compared with 1.06 percent last quarter and 1.04 percent in the same quarter last year.

122. Defendants represented that the Company increased its reserves for loan losses, but did not disclose that Defendants delayed increasing allowances for loan and lease losses to an amount sufficient to cover the Company's risky loan portfolio, which was likely to suffer increased defaults. Defendants' reliance on historical loss rates resulted in an insufficient provision in light of the real estate and financial market.

123. On November 9, 2007, Fifth Third filed its quarterly report on Form 10-Q for the quarter ended September 30, 2007 and made the following disclosures regarding nonperforming assets:

> Commercial nonaccrual credits as a percentage of commercial loans increased since the third quarter of 2006, from .61% to 1.00%. The majority of the increase continues to be driven by the real estate and construction industries in the Southern Florida, Northeastern Ohio and Eastern Michigan affiliates . . . As of September 30, 2007, the Bancorp has outstanding loans to homebuilders of $1.4 billion, exposure of $2.4 billion and $49 million of nonaccrual credits.

> Consumer nonaccrual credits as a percent of consumer loans increased since the third quarter of 2006, from .22% to .41%. The increase in consumer nonaccrual credits is primarily attributable to the housing markets in the Michigan and Florida affiliates, the changes in policy for the repossession of automobiles and the restructuring of certain high risk loans.
>
> * * *
>
> Total nonperforming assets were $706 million at September 30, 2007, compared to $455 million at December 31, 2006 and $411 million at September 30, 2006. Nonperforming assets as a percentage of total loans, leases and other assets, including other real estate owned increased to .92% as of September 30, 2007 compared to .61% as of December 31, 2006 and .56% as of September 30, 2006.

124. Defendants accused "the real estate and construction industries in the Southern Florida, Northeastern Ohio and Eastern Michigan affiliates" for being the cause of increased commercial nonperforming assets and blamed increased consumer nonperforming assets "primarily " on "the housing markets in the Michigan and Florida," which concealed and/or failed to disclose the fact that these increased loan defaults were the inevitable consequence of the Company's abandonment of conservative lending and underwriting standards and its ineffective risk management practices.

125. Defendants further stated in the Form 10-Q for the Third Quarter 2007 that "[t]he provision for loan and lease losses increased to $139 million in the third quarter of 2007" and that the "$52 million increase is related to loan growth during the past year, increases in delinquencies and increases in severity of loss from the decline in the real estate market."

126. However, Defendants concealed and/or failed to disclose that they delayed increasing allowances for loan and lease losses to an amount sufficient to cover Fifth Third's risky loan portfolio. The allowances were inadequate because the credit quality of the loan portfolio was deteriorating as a result of Fifth Third's abandonment of conservative mortgage underwriting practices.

127. The Defendants further concealed and/or failed to disclose that Fifth Third had grossly deficient underwriting and risk management standards and, since at least the third quarter of 2006, originated extremely risky loans, including land loans with LTVs as high as 90% and Alt-A loans with multiple layered risk factors that were precisely the same risk factors characteristic of subprime loans.

128. The Third Quarter 2007 10-Q acknowledged that Fifth Third originated Alt-A mortgages, but inaccurately claimed that borrower qualifications for Alt-A loans were comparable to conforming mortgages, and that such loans were primarily originated for sale rather than being held for investment purposes, stating:

> The Bancorp originates certain non-conforming residential mortgage loans

known as Alt-A. Borrower qualifications are comparable to other conforming residential mortgage products and the Bancorp has sold the majority of these loans into the secondary market without recourse. For the three and nine months ended September 30, 2007, the Bancorp originated $71 million and $644 million of Alt-A loans. During 2007, approximately $150 million of Alt-A loans were moved from held for sale to held for investment, and an impairment charge of approximately $3 million was recognized in the mortgage banking net revenue. As of September 30, 2007, the Bancorp held $163 million of Alt-A loans for investment with approximately $2 million on nonaccrual status. As market conditions for these loans changed throughout 2007, management responded by making adjustments to underwriting standards and, as of September 30, 2007, all Alt-A loans are being underwritten and sold under an agency flow sale agreement.

129. The Company concealed and/or failed to disclose that it had been originating Alt-A loans where the borrowers did not meet the qualifications of conforming residential mortgages. Rather the Alt-A loans were approved for borrowers with multiple risk factors, including FICO scores below 660, unverified employment, unverified income, and unverified assets. Furthermore, the Alt-A loans were approved at LTV rations as high as 100% through the use of 80/20 products.

130. Furthermore, the Third Quarter 2007 10-Q represented that Fifth Third's risk management strategy is based on "conservatism, diversification and monitoring," stating:

> The objective of the Bancorp's credit risk management strategy is to quantify and manage credit risk on an aggregate portfolio basis, as well as to limit the risk of loss resulting from an individual customer default. The Bancorp's credit risk management strategy is based on three core principles: conservatism, diversification and monitoring. The Bancorp believes that effective credit risk management begins with conservative lending practices. These practices include conservative exposure, counterparty limits and conservative underwriting, documentation and collection standards. The Bancorp's credit risk management strategy also emphasizes diversification on a geographic, industry and customer level, regular credit examinations and monthly management reviews of large credit exposures and credits experiencing deterioration of credit quality. Lending officers with the authority to extend credit are delegated specific authority amounts, the utilization of which is closely monitored. Lending activities are largely centralized, while ERM manages the policy and authority delegation process directly. The Credit Risk Review function, within ERM, provides objective assessments of the quality of underwriting and documentation, the

> accuracy of risk grades and the charge-off and reserve analysis process.

131. Defendants' statements regarding their "conservative lending practices" and "core principles" of "conservatism, diversification and monitoring" concealed and/or failed to disclose that Fifth Third had inadequate controls over its loan origination and underwriting and its loan portfolio was riddled with under-collateralized loans issued to borrowers that lacked sufficient incomes or assets to repay their loans. Also, contrary to Defendants' representations, the Company had under-reserved for probable loan losses and a substantially greater proportion of its loan portfolio was impaired or at risk for becoming impaired due to the Company's grossly deficient underwriting and risk management policies.

132. With respect to Fifth Third's capitalization, the Third Quarter 2007 10-Q represented that Fifth Third maintained relatively high levels of capital in order to protect shareholders and that it was well-capitalized, stating:

> The Bancorp maintains a relatively high level of capital as a margin of safety for its depositors and shareholders. At September 30, 2007, shareholders' equity was $9.3 billion, compared to $10.0 billion at December 31, 2006 and September 30, 2006. Average shareholders' equity as a percentage of average assets for the third quarter of 2007 was 9.13% compared to 9.33% in the same quarter last year. Tangible equity as a percent of tangible assets was 6.83% and 7.40% at September 30, 2007 and 2006,

> respectively. The decline in shareholders' equity and the tangible equity ratio are a result of the $1.1 billion in share repurchases during 2007.

133. However, the Company failed to disclose that the credit quality of Fifth Third's Tier 1 capital had severely deteriorated due to the poor credit quality of its loan portfolio and failure to set aside adequate reserves for loan losses, thus leaving the Company undercapitalized. The Company also failed to disclose that, as a direct and proximate result of the foregoing, it would be required to raise massive amounts of capital through, among other things, slashing its annual dividend, selling billions of dollars of dilutive preferred stock, selling assets, and seeking federal bailout funds.

134. The Company concealed and/or failed to disclose its problems stemming from its deterioration in credit quality and the fact that, in reality, it was suffering under the weight of higher loan loss provisions. In truth, Fifth Third was experiencing greater net charge-offs and had failed to sufficiently raise loan loss provisions to an adequate level.

135. On November 14, 2007, Fifth Third presented at the Merrill Lynch 2007 Banking & Financial Services Conference. The Company attempted to focus the attention of investors (including Plan participants) on its expansion in certain markets, including the Southeast and Chicago, and its income diversification and diversified loan portfolio. The Company also boasted that it was experiencing less net charge-offs than its competitors and touted its strong liquidity and capital positions. However, Defendants concealed

and/or failed to disclose that the Company was not using prudent lending standards.

136. On November 29, 2007, Fifth Third gave a presentation to analysts at the Fox-Pitt, Kelton Cochran Caronia Waller Financial Services Conference, wherein the Company touted its credit quality and diversified loan portfolio. Again, Defendants concealed and/or failed to disclose the true magnitude of the risk of Fifth Third's consumer loan portfolio because it failed to disclose: (i) the layering of risk factors such as marginal FICO scores and high LTV ratios; (ii) whether the Company required that borrowers obtain private mortgage insurance for high LTV loans; (iii) whether the Company had verified key borrower information such as employment, income, and assets, particularly on risky Alt-A loans, ARMs, high LTV loans, and marginal FICO score borrowers; (iv) the Company relied on a subjective "reasonableness" standard for assessing the veracity of borrowers' reported incomes and assets for no-documentation loans; (v) Fifth Third had progressively lowered its lending/underwriting standards prior to and during the Class Period; (vi) the Company was routinely making exceptions to its weakened and materially deficient underwriting standards; and (vii) the Company's internal definition of "prime" versus "subprime," which was inconsistent with accepted industry definitions.

137. On January 22, 2008, as the Company's stock price slid downward, the Company issued its fourth quarter and year-end earnings for 2007. Fifth Third reported 2007 earnings of $1.1 billion, or $2.03 per diluted share, compared with $1.2 billion, or $2.13 per diluted share in 2006. Reported fourth quarter 2007

earnings were $38 million, or $0.07 per diluted share, compared with $325 million, or $0.61 per diluted share in the third quarter of 2007 and $66 million, or $0.12 per diluted share, for the same period in 2006. Further, Fifth Third reported a non-cash estimated charge of $155 million, both pre-tax and after-tax, or $0.29 per share, to lower the current cash surrender value of one of its Bank-Owned Life Insurance ("BOLI") policies.

138. While acknowledging that the credit markets were under stress, Fifth Third insisted that it was performing well overall. The Company stated that:

> We have been actively working over the past year to take steps to address areas of concern. These areas include home equity loans and, more generally, real estate loans, particularly in the upper Midwest and Florida. As a lending institution, we know we will experience credit cycles and we expect them. It is our responsibility to ensure that we are prepared for them and that we have the balance sheet strength and earnings power to manage through them. Fortunately, Fifth Third is well-positioned on both counts, and we intend to continue to focus on executing on our strategic plans and capitalizing on opportunities presented by this environment.

See Form 8-K Submission to the SEC, filed January 22, 2008.

139. However, the Company failed to disclose that non-performing assets were increasing at an alarming rate and, further, that its loan portfolio was in need of

a major capital infusion. Moreover, while positive revenue momentum continued, the Company failed to disclose increasing negative trends in loan loss provisions.

140. On January 30, 2008, Fifth Third gave a presentation at the Citi 2008 Financial Services Conference, wherein Defendants touted the Company's purported ability to "[m]aintain strong tangible capital ratios, absolute and relative to peers," including a Tier 1 capital ratio of 7.71% and Tangible Common Equity of 6.07% as percentage of tangible assets. Contrary to the statements in the January 30, 2008 presentation, however, the Company did not disclose the full extent of the deterioration of its loan portfolio and did not reflect the rapidly growing number of loans that had become 30 to 89 days delinquent for which Fifth Third did not take additional reserves. In a declining real estate market, the 30 to 89 day past due loans are considered a lead indicator of and precursor to potential nonperforming loans and charge-offs. As such, these loans should have been considered impaired and the Company should have taken reserves against such loans, but failed to do so in order to continue to artificially inflate the Company's reported financial results. As a result of the deterioration of the credit quality of the Company's loan portfolio, a substantial portion of Fifth Third's Tier 1 Capital was impaired, requiring a massive infusion of capital.

141. On February 22, 2008, Fifth Third filed with the SEC its annual report on Form 10-K, which stated, in relevant part: "[T]he financial statements, and other financial information included in this report, fairly present in all material respects the financial condition,

results of operations and cash flows of the Registrant." The 2007 10-K reiterated the financial results reported in the January 22, 2008 Earnings Release. The Defendants' statements in the 2007 10-K were incomplete and inaccurate because the Company's net income was materially overstated due to Fifth Third's failure to take timely and adequate reserves for loan losses. Throughout the Class Period, Defendants delayed increasing allowances for loan and lease losses in order to preserve the illusion the Fifth Third was profitable and had sufficient earnings to support dividend payments, while remaining well-capitalized.

142. Additionally, the 2007 10-K claimed that Fifth Third did not have any exposure to subprime mortgages or subprime backed securities, stating:

> The Bancorp maintains a conservative approach to both lending and investing activities as it does not originate or hold subprime loans, nor does it hold collateralized debt obligations ("CDOs") or asset-backed securities backed by subprime loans in its securities portfolio. However, the Bancorp has exposure to the housing markets, which weakened considerably during 2007, particularly in the upper Midwest and Florida. Consequently, net charge-offs as a percent of average loans and leases were 61 basis points ("bp") in 2007 compared to 44 bp in 2006. At December 31, 2007, nonperforming assets as a percent of loans and leases increased to 1.32% from .61% at December 31, 2006.

143. Defendants' statement that the Company "maintains a conservative approach to both lending and investing activities as it does not originate or hold subprime loans" was incomplete and inaccurate because Fifth Third had been originating subprime loans under the guise of Alt-A lending since mid-2006, and Fifth Third was forced to retain in its held-for-investment portfolio many of the riskiest loans it originated because it was unable to sell them in the secondary market.

144. The 2007 10-K also claimed that Fifth Third was "well-capitalized," stating:

> The Bancorp's capital ratios exceed the "well-capitalized" guidelines as defined by the Board of Governors of the Federal Reserve System ("FRB"). As of December 31, 2007, the Tier I capital ratio was 7.72% and the total risk based capital ratio was 10.16%. The Bancorp had senior debt ratings of "Aa3" with Moody's, "A+" with Standard & Poor's, "AA-" with Fitch and "AAL" with DBRS at December 31, 2007, which indicate the Bancorp's strong capacity to meet its financial commitments. The "well-capitalized" capital ratios, along with strong credit ratings, provide the Bancorp with access to the capital markets.

145. Defendants' statement that Fifth Third was "well-capitalized" was incomplete and inaccurate because the Company's core Tier 1 capital was severely compromised by the poor credit quality of the Company's loan portfolio, which was deteriorating at a more rapid rate than Defendants publicly disclosed.

Further the statement concealed and/or failed to disclose Defendants' failure to timely and adequately set aside loan loss reserves sufficient to compensate for losses that Defendants could reasonably expect based on, among other things, the percentage of loans in the Company's portfolio that were then 30 to 89 days delinquent.

146. Under the heading "Credit Risk Management," the 2007 10-K reiterated that the Company did not have any subprime exposure, stating:

> If trends in charge-offs, delinquent loans and economic conditions continue to deteriorate in 2008, the Bancorp would expect to record a large allowance for credit losses in accordance with its allowance methodology. Overall, the Bancorp's long history of low exposure limits, lack of exposure to subprime lending businesses, centralized risk management and its diversified portfolio reduces the likelihood of significant unexpected credit losses.

147. With respect to the Company's methodology for setting reserves for loan losses, the 2007 10-K represented that such reserves were based on "conservative" estimates "based on historical loss rates, current credit grades," and that it reviewed loss rates on a quarterly basis and made adjustments in its reserves accordingly:

> The Bancorp maintains an allowance to absorb probable loan and lease losses inherent in the portfolio. The allowance is maintained at a level the Bancorp considers

to be adequate and is based on ongoing quarterly assessments and evaluations of the collectibility and historical loss experience of loans and leases. Credit losses are charged and recoveries are credited to the allowance. Provisions for loan and lease losses are based on the Bancorp's review of the historical credit loss experience and such factors that, in management's judgment, deserve consideration under existing economic conditions in estimating probable credit losses. In determining the appropriate level of the allowance, the Bancorp estimates losses using a range derived from "base" and "conservative" estimates. The Bancorp's strategy for credit risk management includes a combination of conservative exposure limits significantly below legal lending limits and conservative underwriting, documentation and collections standards. The strategy also emphasizes diversification on a geographic, industry and customer level, regular credit examinations and quarterly management reviews of large credit exposures and loans experiencing deterioration of credit quality.

* * *

Historical loss rates for commercial and consumer loans may be adjusted for significant factors that, in management's judgment, are necessary to reflect losses inherent in the portfolio. Factors that management considers in the analysis include the effects of the national and local

economies; trends in the nature and volume of delinquencies, charge-offs and nonaccrual loans; changes in mix; credit score migration comparisons; asset quality trends; risk management and loan administration; changes in the internal lending policies and credit standards; collection practices; and examination results from bank regulatory agencies and the Bancorp's internal credit examiners.

The Bancorp's current methodology for determining the allowance for loan and lease losses is based on historical loss rates, current credit grades, specific allocation on impaired commercial credits and other qualitative adjustments. Allowances on individual loans and historical loss rates are reviewed quarterly and adjusted as necessary based on changing borrower and/or collateral conditions and actual collection and charge-off experience. An unallocated allowance is maintained to recognize the imprecision in estimating and measuring loss when evaluating allowances for individual loans or pools of loans.

148. The 2007 10-K failed to accurately and completely disclose the extent of the growth in the Company's non-performing assets and that the rapidly deteriorating credit quality of its loan portfolio was quickly eroding the Company's capital structure, and would require the Company to raise billions in new capital. Among other things, Defendants failed to take additional reserves for the rapidly growing number of

loans that had become 30 to 89 days delinquent, which should have been considered impaired given the downturn in the real estate market.

149. With respect to Alt-A lending, the 2007 10-K acknowledged that Fifth Third had originated Alt-A loans but did not disclose that the borrower qualifications for Alt-A loans were not comparable to conventional, conforming mortgages. Additionally, Defendants represented that Fifth Third sold the majority of its Alt-A loans without recourse, stating:

> The Bancorp originates certain non-conforming residential mortgage loans known as "Alt-A" loans. Borrower qualifications are comparable to other conforming residential mortgage products and the Bancorp has sold, without recourse, the majority of these loans into the secondary market. For the years ended December 31, 2007 and 2006, the Bancorp originated $756 million and $341 million of Alt-A mortgage loans. During 2007, approximately $152 million of Alt-A mortgage loans were moved from held for sale to held for investment, and an impairment charge of approximately $3 million was recognized in mortgage banking net revenue. As of December 31, 2007, the Bancorp held $134 million of Alt-A mortgage loans for investment with approximately $2.5 million in nonaccrual. As market conditions for these loans changed throughout 2007, management responded by making adjustments to underwriting standards and

> Alt-A loans are being underwritten and sold under an agency flow sale agreement.

150. Defendants' statements in the 2007 10-K regarding the Company's origination of Alt-A loans were incomplete and inaccurate because they continued to blame general market trends for the deterioration in the Company's Alt-A loan portfolio, while concealing and/or failing to disclose that the Company had under-reserved for probable Alt-A loan losses. Contrary to Defendants' representations, Fifth Third lacked adequate controls over its loan origination and underwriting and its Alt-A loan portfolio was riddled with under-collateralized loans issued to borrowers who lacked sufficient incomes or assets to repay their loans. The Company's representation that the borrower qualifications for Alt-A loans were "comparable to other conforming residential mortgage products" concealed and/or failed to disclose that the Alt-A loans were actually comparable to subprime loans.

151. On or about March 17, 2008, Moody's Investors lowered its outlook on Fifth Third to negative, predicting that a deterioration of the Company's core profitability was likely to continue.

152. Despite the fact that they knew or should have known that Fifth Third Stock was an imprudent Plan investment, Defendants took no action whatsoever to protect the Plan's assets from losses.

153. On April 22, 2008, the Company issued First Quarter 2008 earnings of $292 million, or $0.55 per diluted share, compared with $16 million, or $0.03 per diluted share in the fourth quarter of 2007 and $359

million, or $0.65 per diluted share, for the same period in 2007.

154. The Company attempted to focus on the positive. Defendant Kabat stated that Fifth Third had "produced excellent loan and deposit growth that drove impressive performance in net interest income and continued strong fee growth from our businesses." While acknowledging higher credit costs, primarily reflecting further deterioration of residential real estate, homebuilder and residential development loans, as well as nonperforming asset growth and higher loan losses, the Company stated that it remained "very active in taking steps to address the issues we and the industry are facing, and to work with borrowers to address difficulties they are experiencing." Fifth Third also reassured investors that:

> though every credit cycle differs, we expect them to occur. We take seriously our responsibility to provide credit to our customers, to lend prudently, and to maintain the capital necessary to manage through these cycles. This is an unusually difficult cycle, but we believe Fifth Third is well-positioned relative to many of its peers. We expect to continue to post strong operating results, to execute on our strategic plans, and to capitalize on the opportunities that are created by an environment such as this.

See Form 8-K Submission to the SEC, filed April 22, 2008.

155. The Company's Tier 1 capital ratio was in need of support because it had continued to deteriorate, necessitating a major infusion of capital. However, Fifth Third continued to conceal and/or failed to disclose the truth regarding its financial condition and its exposure to mortgage-related losses. The Company failed to disclose the true magnitude of its ever-increasing provisions for loan and lease losses.

156. The deception was successful as the Company's stock price experienced an 8% increase.

157. Meanwhile, Fifth Third's credit losses were increasing from an unabated trend as the housing market continued to stumble in the Mid-West region and Defendants knew or should have known that its dangerous increase in net charge-offs would continue to climb.

158. Further, the Company's deteriorating capital base necessitated a sale of non-core businesses to supplement common equity capital. Fifth Third described these non-core businesses as "several non-strategic businesses that are not significantly synergistic with [Fifth Third's] core financial services businesses." *See* June 18, 2008 Company Press Release.

159. On May 2, 2008, Fifth Third announced the resignation of Chief Financial Officer Christopher G. Marshall and stated that Daniel T. Poston, Executive Vice President and Controller of Fifth Third Bancorp, would serve as the Chief Financial Officer of Fifth Third until a permanent successor of Marshal was named.

160. In mid-May 2008, Bloomberg reported that a sharp decline in a Fifth Third hedge fund investment

led to the more than $300 million in charge-offs the bank had taken with respect to its BOLI policies. While the Company had acknowledged that the charge was caused by "further deterioration in the values of the underlying investments of the policy," it had failed to disclose that much of the losses came about because of hedge investments within those policies. *Hedge Funds Hurt Fifth Third's Results*, Dayton Business Journal, dated May 20, 2008.

161. Fifth Third continued to conceal and/or fail to disclose the truth regarding its financial condition. During a May 2008 UBS Financial Services conference, defendant Kabat told a UBS conference that he was "reasonably confident" that bad loans would "not require significant additional reserves to cover losses." Laurie Kulowski, *Banks Continue to Stuff Loan Cushions*, TheStreet.com, dated May 22, 2008.

162. By at least June 2008, Fifth Third launched a program entitled "You Have Options," designed to reach distressed borrowers in danger of default. On June 9, 2008, Fifth Third completed its $1.1 billion acquisition of First Charter Corp., adding 57 branches in the Southeast, primarily in North Carolina. As noted above, First Charter Corp. was involved in subprime residential lending.

163. As a result of Defendants' inaccurate statements and omissions, the Company's Stock traded at artificially inflated prices during the Class Period. However, Defendants failed to take any action to protect Plan participants from losses, as Fifth Third's financial condition deteriorated.

D. The Truth Emerges

164. On June 18, 2008, the Company announced that, to cope with mounting credit losses because of the deterioration of the credit quality of the company's Tier 1 capital due to the Company's exposure to the housing market crisis, it would slash its quarterly dividend 66% and needed to raise at least $2 billion in additional capital. Additionally, the Company expected to set aside $700 to $725 million for loan and lease losses and to incur $340 to $350 million of net charge-offs in the second quarter of 2008. Further, the Company announced that it expected its loan loss reserves to grow and its charge-offs in 2009 to be higher than the expected 1.6% to 1.65% in 2008.

165. The Company said that it would sell $1 billion convertible preferred shares and raise at least $1 billion more in capital from selling some of its "non-core" subsidiaries over the next several quarters. This announcement came merely one month after defendant Kabat told investors on a conference call that he did not foresee the need to raise significant common equity.

166. Further, the Company revealed that earnings could be as little as 1 to 5 cents per share, whereas analysts surveyed by Bloomberg had, based on the Company's prior representations as to its financial performance, expected an average of more than 40 cents per share. Elizabeth Stanton, *U.S. Stocks Fall on FedEx's Loss, Fifth Third's Dividend Cut*, Bloomberg.com, dated June 18, 2008.

167. Essentially, the Company was suffering increasing credit losses, particularly in its residential

real estate, commercial mortgage and commercial construction portfolios in Florida and Michigan.

168. Fifth Third also revealed that it could incur a $250 million charge over its accounting for leveraged leases.

169. At least one analyst noted that the Company had over-stretched itself with its untimely $1.1 billion acquisition of First Charter Corp. and acquisitions in Florida. Jonathan Stempel, *Fifth Third to Raise $2 bln Capital, Cut Dividend*, Reuters.com, dated June 18, 2008.

170. Additionally, the Company announced major changes in its leadership. It replaced George A. Schaefer, Jr. with defendant Kabat as Chairman of the Board, and named defendant Hackett as its lead director.

171. Defendant Kabat admitted, "Our bottom line results won't meet our expectations. We are not satisfied."

172. The Company also announced the cost of uncollectible loans in 2009 would rise well above 2008 levels – thereby substantiating the ever increasing (though undisclosed) negative trends pressuring the Company.

173. These disclosures also indicated that the Company's Tier 1 capital was under pressure, requiring immediate support.

174. Following the June 18, 2008 announcement, which contrasted sharply to the Company's earlier Class Period statements, Fifth Third Stock dropped as

much as 27% from the previous day's closing at $12.73 and closed at $9.26 per share on very heavy trading volume on June 18, 2008.

175. On July 22, 2008, Fifth Third again surprised the market by posting its first loss in at least nine years. The Company reported a second quarter loss of $202 million, or 37 cents per share, compared a profit of $376 million, or 69 cents per share, during the second quarter of 2007. Further, the Company revealed that it was setting aside additional money to cover bad debts in distressed housing markets, including Florida and Michigan. Shortly thereafter, July 23, 2008, Fifth Third's largest shareholder, Cincinnati Financial Corp., sold more than half of its holdings in Fifth Third Stock.

176. On October 21, 2008, Fifth Third announced a second consecutive quarterly loss. The Company announced a Third Quarter net loss of $56 million, or 14 cents a share, compared with a profit of $325 million, or 61 cents a share a year earlier. Defendant Kabat stated, "We are not immune to disruptions in the capital markets and weakening economic conditions."

177. On January 22, 2009, Fifth Third Stock dropped to its lowest level in 22 years after announcing a third consecutive quarterly loss due to "bad loans" and a $965 million write down. The Company's Stock price dropped 29% from $3.99 per share on January 21, 2009 to $2.85 per share on January 22, 2009 after the company announced a fourth quarter net loss of $2.14 billion, or $3.82 a share, compared with a profit of $16 million, or 3 cents a share a year ago.

178. As a result, Fifth Third suspended bonuses, slashed its quarterly dividend to a penny. As a further

indication of the Company's weakened financial condition, it sold $3.4 billion in preferred shares to the U.S. government's Troubled Asset Relief Program ("TARP"). TARP allows the United States Department of the Treasury to purchase or insure up to $700 billion of "troubled" assets. "Troubled assets" are defined as:

> (A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and (B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.

See A Congressional Budget Office Report: The Troubled Asset Relief Program: Report on Transactions Through December 31, 2008, at 1 January 20, 2009.

179. Defendant Kabat stated in a press release on January 22, 2009 that "[e]conomic conditions have deteriorated across our footprint and have placed both our consumer and commercial loan portfolios under significant stress."

180. David George, a Robert W. Baird & Co. analyst, said about the Company: "Core asset quality

trends continue to deteriorate, and we simply are having an increasingly difficult time justifying buying the stock if we had a clean slate." As a result, George cut his rating from "outperform" to "neutral."

181. Further, Argus downgraded Fifth Third to "Sell" from "Hold" after the Fourth Quarter results were much worse than expected. Argus was not confident that Fifth Third would survive the credit crisis and suggested that either an FDIC seizure or a government-assisted takeover by another bank is likely.

182. On February 2, 2009, Bloomberg reported that in January 2009, Cincinnati Financial Corp. sold its remaining shares of Fifth Third Stock after the Company announced in December 2008 that it cut its dividend. *See* Bloomberg, *Cincinnati Financial Sells All Fifth Third Holdings*, dated February 2, 2008.

183. On March 30, 2009, the Company announced Fifth Third and Advent International entered into a master investment agreement pursuant to which Advent will purchase a majority interest in Fifth Third's processing business. The purpose of the investment agreement was to raise much needed capital – about $1.2 billion in tangible common equity and Tier 1 capital.

184. On April 14, 2009, Bloomberg reported that Fifth Third Securities Inc. was fined $1.75 million by the Financial Industry Regulatory Authority (FINRA) and ordered to pay customers $260,000 for violations in selling variable annuity products that are used as retirement savings accounts. According to FINRA, Firth Third made 250 unsuitable variable annuity

trades, from January 2004 through December 2006. *See* Bloomberg, *Fifth Third Securities Fined $1.75 Million for Annuity Sales*, dated April 14, 2009.

185. As described further herein, Defendants, as fiduciaries of the Plan, were obligated to ensure that the Plan's investment alternatives—including the Fifth Third Stock Fund—were prudent investments for the Plan's assets. However, Defendants failed to do so, to the substantial detriment of the Plan and its participants.

186. Since the beginning of the Class Period, on July 19, 2007, through the present, the Plan's imprudent investments in Fifth Third Stock have been decimated, as indicated below:

Source: http://www.bigcharts.com.

E. Defendants Knew or Should Have Known That Fifth Third Stock Was an Imprudent Investment For The Plan, Yet Mislead Plan Participants

187. During the Class Period, Defendants knew or should have known that the Company's stock was an imprudent Plan investment, due to: (a) the Company's exposure to certain poorly performing real estate markets, including Florida and Michigan, and the extent to which this exposure was materially increasing; (b) the Company's growing exposure to late payments and defaults on mortgages and other non-performing loans, and the extent to which this exposure was materially increasing; (c) the extent of the decline in the quality of the Company's Tier 1 capital base; (d) the deteriorating credit trends and increasing expenses, including negative trends, in the Company's consumer loan portfolio, including the extent of the increase in late payments and defaults; (e) the negative trends in the Company's home equity and commercial construction loans, and the extent to which there was a decrease in the value of the underlying assets and an increase in late payments and defaults; (f) the fact that, as a consequence of the above, the Company's stock price was artificially inflated; and (g) the fact that heavy investment of retirement savings in Company stock would inevitably result in significant losses to the Plan, and consequently, to its participants. Despite actual or constructive knowledge of these facts, Defendants did nothing to protect the heavy investment of Plan participants' retirement savings in Fifth Third Stock.

188. As a result of the enormous erosion of the value of Company stock, the Plan's participants, the

retirement savings of whom was heavily invested in Fifth Third Stock, suffered unnecessary and unacceptable losses.

189. Through their high ranking positions within the Company, Defendants knew or should have known of the existence of the above-mentioned problems.

190. Defendants knew or should have known that, due to the Company's exposure to losses stemming from the problems within the mortgage and housing markets, the Company stock price would suffer and devastate participants' retirement savings once the truth became known. Yet Defendants failed to take any steps to protect the Plan and its participants from foreseeable losses.

191. Defendants also knew or should have known that, as a result of the omissions made, or failed to be corrected, by Defendants, Plan participants and beneficiaries could not properly assess the prudence of investing in Fifth Third Stock or otherwise take steps to protect their financial interests.

192. As a result of Defendants' knowledge of and, at times, implication in creating and maintaining public misconceptions concerning the true financial health of the Company, any generalized warnings of market and diversification risks that Defendants made to the Plan's participants regarding the Plan's investment in Fifth Third Stock did not effectively inform the Plan's participants of the past, immediate, and future dangers of investing in Company stock.

193. Defendants failed to conduct an appropriate investigation into whether Fifth Third Stock was a prudent investment for the Plan and, in connection

therewith, failed to provide Plan participants and beneficiaries with information regarding Fifth Third's problems so that participants could make informed decisions regarding whether to include Fifth Third Stock in the Plan.

194. In addition, upon information and belief, Defendants failed to adequately review the performance of the other fiduciaries of the Plan to ensure that they were fulfilling their fiduciary duties under the Plan and ERISA.

195. An adequate (or even cursory) investigation would have revealed to a reasonable fiduciary that investment by the Plan in Fifth Third Stock was clearly imprudent. A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have made different investment decisions.

196. Because Defendants knew or should have known that Fifth Third Stock was not a prudent investment option for the Plan, they had an obligation to protect the Plan and their participants from unreasonable and entirely predictable losses incurred as a result of the Plan's investment in Fifth Third Stock.

197. Defendants had available to them several different options for satisfying this duty, including, among other things: discontinuing further contributions to and/or investment in Fifth Third Stock under the Plan; divesting the Plan of Fifth Third Stock; making appropriate public disclosures as necessary; consulting with the DOL or independent fiduciaries regarding appropriate measures to take in order to

prudently and loyally serve the participants of the Plan; and/or resigning as fiduciaries of the Plan to the extent that they could not loyally serve the Plan and its participants in connection with the Plan's acquisition and holding of Fifth Third Stock.

198. Despite the availability of these and other options, Defendants failed to take any action to protect participants from losses resulting from the Plan's investment in Fifth Third Stock. In fact, the Defendants continued to invest and to allow investment of the Plan's assets in Company stock even as Fifth Third's problems came to light.

F. Defendants Suffered from Conflicts of Interest

199. As ERISA fiduciaries, Defendants were required to manage the Plan's investments, including the investment in Fifth Third Stock, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to resolve them promptly when they occur.

200. Conflicts of interest arise when a company that invests plan assets in company stock founders. As the situation deteriorates, plan fiduciaries are torn between their duties as officers and directors for the company on the one hand, and to the plan and plan participants on the other. As courts have made clear, "[w]hen a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions." *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir.1992) (citation omitted). Fiduciaries must avoid "placing

themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

201. Fifth Third's SEC filings, including proxy statements, during the Class Period make clear that a significant percentage of the Company's officers' and directors' compensation is stock-based. *See* Fifth Third Definitive Proxy Statement, Form 14A, dated March 10, 2009 ("2009 Form 14A").

202. For example, Defendant Kabat, along with other Company Board of Directors, has the right to acquire the shares of Company stock upon the exercise of stock options and stock appreciation rights, respectively. The aggregate number of shares issuable upon the exercise of currently exercisable (or exercisable within 60 days), but unexercised, stock options and stock appreciation rights held by the Executive Officers who are not also Directors or nominees is 1,441,970. *See* 2009 Form 14A at 5.

203. Defendant Kabat received stock awards for 2008 and 2007 in the amount of $814,523 and $704,985, respectively. He also received option awards for 2008 and 2007 in the amount of $1,210,135 and $1,486,770, respectively. *See id.*

204. Defendant Carmichael received stock awards for 2008 and 2007 in the amount of $389,640 and $494,395, respectively. He also received option awards for 2008 and 2007 in the amount of $564,310 and $710,137, respectively. *See id.*

205. Defendant Sullivan received stock awards for 2008 and 2007 in the amount of $216,997 and $270,775, respectively. He also received option awards for 2008 and 2007 in the amount of $ 334,403 and $579,409, respectively. *See id.*

206. Further, according to the Fifth Third Definitive Proxy Statement, Form 14A, dated March 6, 2008 ("2008 Form 14A"), under the heading "Base Salary," "[s]alary increases are based on the Company's overall performance and the executives attainment of individual objectives . . . ." The "Pay for Performance" section of the Proxy Statement provides that the certain Defendants' "compensation is based on individual, division and Company performance," including "Growth in core deposits, loans, fees, total revenue, net income and earnings per share" and "stock price growth and price/earnings ratio."

207. Further, under the heading "2007 Long-term Equity-based Compensation Awards," the 2008 Form 14A provides that executive compensation is based in part on the "Company's revenue and expense results."

208. Certain Defendants' compensation was directly tied to the performance of the Company and the price of Fifth Third Stock. Accordingly, certain Defendants were motivated to inflate the perceived success of the Company and boost its apparent performance in order to increase their salaries and incentive compensation.

209. Although some Defendants may have had no choice in tying their compensation to Fifth Third Stock (because compensation decisions were out of their hands), all Defendants had the choice of whether to

keep the Plan's participants' and beneficiaries' retirement savings invested in Fifth Third Stock or whether to properly inform participants of material negative information concerning the above-outlined Company problems.

210. Finally, any signal to the market that the Company was not a sound, long term investment, such as the Plan's divestiture of Fifth Third Stock, would have called into question Defendants' job performance as corporate officers. Rather than have anyone question their soundness as leaders of Fifth Third, Defendants chose to remain silent and let the Plan continue to hold and acquire Fifth Third Stock.

211. These conflicts of interest put Defendants in the position of having to choose between their own interests as directors, executives, and stockholders, and the interests of the Plan's participants and beneficiaries, in whose interests Defendants were obligated to loyally serve with an "eye single."

212. While the above Defendants protected themselves, they stood idly by as the Plan lost millions of dollars because of its investment in Fifth Third Stock.

G. Defendants' Actions/Inactions Concealed Their Fiduciary Breaches

213. Defendants' breaches of their ERISA-mandated fiduciary duties of prudence and loyalty, by their very nature, were self-concealing and could not be reasonably discovered through due diligence of the Plan's participants during the Class Period. Further, certain of Defendants' alleged breaches, including breaches of their duties to speak truthfully and provide

material information to Plan participants regarding the propriety of investing Plan assets in Fifth Third stock during the Class Period, also actively served to conceal Defendants' primary breach of their duty of prudence. Defendants' misleading, inaccurate and incomplete statements regarding the true financial health and prospects of the Company served to hide from Plan participants, *inter alia*: (a) the factual predicates underlying Plaintiffs' claims of the imprudence of Fifth Third Stock during the Class Period and (b) the failure/absence of any investigation into the prudence of investing Plan assets in Fifth Third Stock during the Class Period. Therefore, Plaintiffs claims are timely brought under all applicable prongs of ERISA § 413 (1)-(2), 29 U.S.C. § 1113 (1)-(2).

VIII. THE RELEVANT LAW

214. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a plan participant for relief under ERISA § 409, 29 U.S.C. § 1109.

215. An individual may be a fiduciary for ERISA purposes either because the plan documents explicitly describe fiduciary responsibilities or because that person functions as a fiduciary. *See* U.S.C. § 1002(21)(A); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995).

216. When fiduciaries put the interests of the company or their own interests ahead of the interests of plan participants, they violate ERISA. A fiduciary may, therefore, be personally liable to plan participants for breaching the responsibilities, obligations, or duties

imposed under the plan and must restore any losses to the plan with any profits the fiduciary made through use of plan assets. ERISA § 409(a), 29 U.S.C. § 1109(a).

217. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provide, in pertinent part:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

218. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose, and prudence and are the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

219. A fiduciary breaches the duty of loyalty when the fiduciary withholds information that the fiduciary knows or should know a participant would need to make an informed decision. Therefore, the duty of loyalty includes: (i) a negative duty not to misinform; (ii) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (iii) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

220. A fiduciary must avoid conflicts of interest and resolve them promptly when they do occur. As such, a plan fiduciary must always administer a plan with an exclusive purpose or "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. *Bierwirth*, 680 F.2d at 271.

221. A plan fiduciary is also responsible for the investment and monitoring of plan investments, ensuring that only prudent investments are offered as plan options, and monitoring such investments to ensure that they remain prudent and suitable for the plan. *In re ADC Telecomm, ERISA Litig.*, No. 03-2989, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004). This includes the duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investment alternatives of a plan to ensure that each investment is a suitable option for the plan.

222. ERISA § 405(a), 29 U.S.C. § 1105(a), "Liability for Breach by Co- Fiduciary," provides, in pertinent part:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary,

knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

223. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of a fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given decision, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary did not participate in a breach, if he knows of a breach, he must take steps to remedy it.

> [I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the

> breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

224. Plaintiffs bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a), and for other equitable and remedial relief..

IX. CAUSES OF ACTION

COUNT I:

Failure to Prudently and Loyally Manage the Plans' Assets (Breaches of Fiduciary Duties in Violation of ERISA § 404 and § 405 by All Defendants)

225. Plaintiffs incorporate by this reference the paragraphs above.

226. This Count alleges fiduciary breach against the following Defendants: the Company, Defendant

Kabat and the Committee Defendants, (collectively, the "Prudence Defendants").

227. As alleged above, during the Class Period, the Prudence Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

228. As alleged above, the scope of the Prudence Defendants' fiduciary duties and responsibilities included managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. Therefore, the Prudence Defendants were directly responsible for selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan, and directing the Trustee regarding same. The Prudence Defendants were also responsible for, among other things, evaluating the merits of the Plan's investments on an ongoing basis, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

229. Contrary to their duties and obligations under ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, these Defendants knew or should have known that Fifth Third Stock was not a suitable and appropriate investment for the Plan, but was, instead, a highly speculative and risky investment in light of the Company's fundamental weaknesses. Nonetheless, during the Class Period, these Defendants continued to offer Fifth Third Stock

as an investment option for participant Plan contributions and, for part of the Class Period, as the sole investment receptacle for matching contributions. They did so despite evidence that (a) First Third's operating expenses were rapidly increasing; (b) Fifth Third was undergoing higher loan losses due to its weakening credit quality; (c) Fifth Third was in need of a cash infusion to offset the undisclosed negative trends in loan losses; (d) Fifth Third's Non-Performing Assets were dangerously increasing; and (e) Fifth Third's Tier 1 capital base had declined precipitously and required a major infusion of capital.

230. The Prudence Defendants were obliged to prudently and loyally manage all of the Plan's assets. However, their duties of prudence and loyalty were especially significant with respect to Fifth Third Stock because: (a) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and (b) participants tend to underestimate the likely risk and overestimate the likely return of investment in Company stock. In light of this, the Prudence Defendants were obliged to institute a regular, systematic procedure for evaluating the prudence of investment in Fifth Third Stock.

231. Moreover, the Prudence Defendants failed to conduct an appropriate investigation of the merits of continued investment in Fifth Third Stock, even though the Company's financial situation posed a great danger to the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to maintain investment in Fifth Third Stock under these circumstances.

232. The Prudence Defendants' decisions regarding the Plan's investment in Fifth Third Stock described above, under the circumstances alleged herein, constituted an abuse of fiduciary discretion because a prudent fiduciary acting under similar circumstances would have made different investment decisions. A prudent fiduciary would not have reasonably believed that continued investment of the Plan's contributions and assets in Fifth Third Stock was in keeping with the Plan settlor's expectations of how a prudent fiduciary would operate.

233. The Prudence Defendants were obligated to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

234. According to DOL regulations and case law interpreting the statutory provision above, a fiduciary's investment or investment course of action is prudent if: (a) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (b) he has acted accordingly.

235. According to DOL regulations, "appropriate consideration" in this context includes, but is not necessarily limited to:

> (1) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and
>
> (2) consideration of the following factors as they relate to such portion of the portfolio:
>
> (a) the composition of the portfolio with regard to diversification;
>
> (b) the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
>
> (c) the projected return of the portfolio relative to the funding objectives of the plan.

236. Given the conduct of the Company as described above, the Prudence Defendants did not act prudently when they continued to invest the Plan's

assets in Fifth Third Stock because, among other reasons, these Defendants knew or should have known of and failed to investigate the failures of the Company, which included: (a) First Third's operating expenses were rapidly increasing; (b) Fifth Third was undergoing higher loan losses due to its weakening credit quality; (c) Fifth Third was in need of a cash infusion to offset the undisclosed negative trends in loan losses; (d) Fifth Third's Non-Performing Assets were dangerously increasing; and (e) Fifth Third's Tier 1 capital base had declined precipitously and required a major infusion of capital.

237. As such, the risk associated with the investment in Fifth Third Stock during the Class Period was far above the normal, acceptable risk associated with investment in company stock.

238. Plan participants were unaware of this risk and the Prudence Defendants knew or should have known as much.

239. Given this inequity, the Prudence Defendants had a duty to avoid permitting the Plan or any participant to invest Plan assets in Fifth Third Stock.

240. Further, knowing the Fifth Third Company Stock Fund in the Plan was not a diversified portfolio but was heavily invested in Company stock, these Defendants had a heightened responsibility to divest the Plan of Company stock if it became or remained imprudent.

241. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve conflicts promptly when they occur. A fiduciary must always administer a plan with single-minded

devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. Certain Defendants were motivated to inflate the perceived success of the Company and boost its apparent performance, because the better the Company's performance and, consequently, the higher the price of the Company's stock, the larger certain Defendants' salaries and incentive compensation. Fiduciaries laboring under such conflicts must, in order to comply with the duty of loyalty, make special efforts to assure that their decision-making process is untainted by the conflict and is made in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the plan.

242. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by: (a) failing to engage independent advisors who could make independent judgments concerning the Plan's investment in Fifth Third Stock; (b) failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made Fifth Third Stock an unsuitable investment for the Plan; (c) failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; (d) failing to disregard the impact of their duty to avoid conflicts of interest on their own compensation; and (e) placing their own and Fifth Third's improper interests above the interests of the participants with respect to the Plan's investment in Fifth Third Stock.

243. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan documents or

directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor allow others, including those who they direct or who are directed by the plan, to do so.

244. The Prudence Defendants breached this duty by: (a) continuing to offer Fifth Third Stock as an investment option for participants of the Plan; (b) continuing to invest assets of the Plan in Fifth Third Stock rather than in cash or other short-term investment options; (c) failing to divest the Plan of imprudent Fifth Third Stock; and (d) engaging in this course of conduct when Defendants knew or should have known that Fifth Third Stock no longer was a prudent investment for participants' retirement savings.

245. The Prudence Defendants also breached their duties of loyalty and prudence by failing to provide complete and accurate information to Plan participants and beneficiaries regarding (a) the Company's overexposure to loans tied to the declining housing and construction market; (b) the Company's exposure to subprime loans through its ill-timed acquisition of First Charter Corp., a company involved with subprime residential lending; (c) the failure to implement and maintain sufficient risk management control processes; (d) the failure to properly reserve for losses; (e) the failure to properly account for and disclose its exposure to losses tied to its business operations in the subprime

market; (f) the artificial inflation of Fifth Third stock caused by these circumstances; and (g) the dire financial circumstances created by Fifth Third's subprime exposure and improper business practices. During the Class Period, upon information and belief, the Company fostered a positive attitude toward the Fifth Third Stock among Plan participants and beneficiaries and/or allowed Plan participants to follow their natural bias towards investment in employer stock by not disclosing negative material information concerning investment in Fifth Third Stock. As such, participants in the Plan could not appreciate the true risks presented by investments in the Company's stock and therefore could not make informed decisions regarding their investments in the Plan.

246. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If these Defendants had discharged their fiduciary duties by prudently investing the Plan's assets, the losses suffered by the Plan would have been minimized or avoided altogether.

247. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

248. Pursuant to ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2), the Prudence Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT II:

Failure To Monitor Fiduciaries (Breaches of Fiduciary Duties in Violation of ERISA § 404 by Fifth Third and the CEO)

249. Plaintiffs incorporate by this reference the allegations above.

250. This Count alleges fiduciary breach against the following Defendants: the Company and Kabat (collectively, the "Monitoring Defendants").

251. As alleged above, during the Class Period, the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

252. The scope of the Monitoring Defendants' fiduciary responsibilities includes the responsibility to appoint and remove, and thus monitor the performance of other fiduciaries. The Company exercises its plan administrator functions through the Committee Defendants with respect to the Plan. Thus, it has a duty to monitor the Committee Defendants.

253. Defendant Kabat was responsible for appointing, replacing, and monitoring the members of the Committee.

254. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect

to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

255. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether their fiduciary appointees are properly performing their fiduciary responsibilities. In the absence of a sensible process for monitoring appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

256. Furthermore, a monitoring fiduciary must provide their fiduciary appointees with complete and accurate information that they know or reasonably should know that the fiduciary appointees must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

257. On information and belief, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (a) failing, at least with respect to the Plan's investment in Fifth Third Stock if not on a broader basis, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and inaction with respect to Fifth Third Stock; (b) failing to ensure that their fiduciary appointees appreciated the true extent

of Fifth Third's highly risky and inappropriate business practices, and the likely impact of such practices on the value of the Plan's investment in Fifth Third Stock; (3) failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and (4) failing to remove appointees whose performance was inadequate insofar as they continued to allow and maintain investments in Fifth Third Stock despite their knowledge of practices that rendered Fifth Third Stock an imprudent investment during the Class Period for participants' retirement savings in the Plan.

258. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided altogether.

259. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly the Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

260. Pursuant to ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT III:

Failure to Avoid Conflicts of Interest (Breaches of Fiduciary Duties in Violation of ERISA §§ 404 and 405 by all Defendants)

261. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

262. At all relevant times, as alleged above, Defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Consequently, they were bound by the duties of loyalty, exclusive purpose and prudence.

263. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on a plan fiduciary a duty of loyalty – that is, a duty to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.

264. Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, inter alia: failing to timely engage independent fiduciaries who could make independent judgments concerning the Plan's investments in the Company's own securities and by otherwise placing their own and/or the Company's interests above the interests of the participants with respect to the Plan's investment in Fifth Third Stock.

265. As a consequence of Defendants' breaches of fiduciary duty, the Plan suffered at least tens of millions of dollars in losses. If Defendants had

discharged their fiduciary duties to prudently manage and invest the Plan's assets, the losses suffered by the Plan would have been minimized or avoided altogether.

266. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan suffered losses, and indirectly the Plan's participants, lost a significant portion of their retirement investments.

267. Pursuant to ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT IV:

Co-Fiduciary Liability
(Breaches of Fiduciary Duties in
Violation of ERISA § 405 by all Defendants)

268. Plaintiffs incorporate by this reference the allegations above.

269. This Count alleges co-fiduciary liability against all Defendants.

270. As alleged above, during the Class Period Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

271. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other

provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

272. ***Knowledge of a Breach and Failure to Remedy***. ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a breach by another fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each Defendant knew of the breaches by the other fiduciaries and made no effort to remedy those breaches.

273. Fifth Third, through its officers and employees, was unable to meet its business goals, engaged in highly risky and inappropriate business practices, withheld material information from the market, and profited from such practices. Thus, knowledge of such practices is imputed to Fifth Third as a matter of law.

274. Because Defendants knew of the Company's failures and inappropriate business practices, they also knew that Defendants were breaching their duties by continuing to maintain Plan investments in Company stock. Yet they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance of Fifth Third's failed and inappropriate business practices and by obfuscating the risk that these practices posed to the Company, and, thus, to the Plan.

275. ***Knowing Participation in a Breach***. ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary knowing such act or omission is a breach. Fifth Third knowingly participated in the fiduciary breaches of Defendants who failed to prudently and loyally manage the Plan in that it benefited from the sale or contribution of its stock at prices that were disproportionate to the risks for Plan participants.

276. ***Enabling a Breach***. ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

277. The Monitoring Defendants' failure to monitor the Committee Defendants enabled that Committee to breach its duties.

278. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly the Plaintiffs and the Plan's other participants and beneficiaries, lost millions of dollars of retirement savings.

279. Pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109(a) and 1132(a)(2), all Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

X. CAUSATION

280. The Plan suffered millions of dollars in principal losses because Defendants imprudently invested the Plan's assets in Fifth Third Stock during the Class Period in breach of Defendants' fiduciary duties.

281. Had Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating Fifth Third Stock as an investment alternative when it became imprudent, and divesting the Plan of Fifth Third Stock when maintaining such an investment became imprudent, the Plan would have avoided some or all of the losses that it, and indirectly the Plan participant, suffered.

XI. REMEDY FOR BREACHES OF FIDUCIARY DUTY

282. Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in Fifth Third Stock during the Class Period.

283. As a consequence of Defendants' breaches, the Plan suffered significant losses.

284. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to make good to such plan

any losses to the plan." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate."

285. With respect to calculation of the losses to the Plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have maintained its investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plan's assets in the most profitable alternative investment available to them. The Court should adopt the measure of loss most advantageous to the Plan. In this way, the remedy restores the Plan's lost value and puts the participants in the position they would have been in if the Plan had been properly administered.

286. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the form of: (1) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a), 502(a)(2), 29 U.S.C. §§ 1109(a), 1132(a)(2); (3) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (4) taxable costs and interest on these amounts, as provided by law; and (5) such other legal or equitable relief as may be just and proper.

287. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plan in this case.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

A. A Declaration that Defendants, and each of them, have breached their ERISA fiduciary duties to the Plan and Plan participants;

B. An Order compelling Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if Defendants had fulfilled their fiduciary obligations;

C. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty to the extent allowable by law;

D. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investment in Fifth Third Stock;

E. Actual damages in the amount of all losses the Plan suffered;

F. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

G. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law; and

H. An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants.

Dated: September 21, 2009

Respectfully submitted,

By: /s/ Ronald R. Parry
Ronald R. Parry
PARRY DEERING FUTSCHER & SPARKS, PSC
411 Garrard Street
Covington, Kentucky 41012-2618
Email: Rparry@pdfslaw.com
Tel: (859) 291-9000
Fax: (859) 291-9300

GAINEY & McKENNA
Thomas J. McKenna
295 Madison Avenue, 4th Floor
New York, NY 10017
Tel: (212) 983-1 300
Fax: (212) 983-0383
Email: tjmlaw2001@yahoo.com
tjmckenna@gaineyandmckenna.com

BARROWAY TOPAZ & KESSLER, LLP
Joseph H. Meltzer
Edward W. Ciolko
280 King of Prussia Road
Radnor, PA 19087

Tel: (610) 667-7706
Fax: (610) 667-7056
Email: jmeltzer@smtk.com
Email: eciolko@smtk.com

Robert M. Smyth
DREW & WARD CO., LPA
1 W. Fourth St., Suite 2400
Cincinnati, OH 45202
Tel: (513) 621-8210
Fax: (513) 621-5444

Counsel for Plaintiffs

[*Certificate of Service Omitted in Printing of this Joint Appendix*]

* * *

EXHIBIT A

THIS DOCUMENT CONSTITUTES PART OF A PROSPECTUS COVERING SECURITIES THAT HAVE BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933.

Summary Plan Description

of

The Fifth Third Bancorp

Master Profit Sharing Plan

(as of August 8, 2007)

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INTRODUCTORY INFORMATION

This booklet is a summary plan description of The Fifth Third Bancorp Master Profit Sharing Plan (as of August 8, 2007). The predecessor to the Plan was originally established effective as of January 1, 1955.

This booklet is only a summary. The legal Plan documents contain many complex provisions. The legal documents will govern and control the operation of the Plan. In addition, the Plan is subject to the federal tax laws applicable to tax-qualified plans.

The Plan Name is The Fifth Third Bancorp Master Profit Sharing Plan.

Fifth Third Bank is the Plan Sponsor. Certain other subsidiaries of Fifth Third Bancorp are also participating employers under the Plan. The terms "employer" and "Fifth Third" as used in this summary refer to any Fifth Third Bancorp affiliate that is a participating employer under the Plan. A complete list of the employers sponsoring the Plan may be obtained upon written request to the plan administrator and is available for examination by participants and beneficiaries.

The Employer Identification Number (EIN) used for the plan sponsor is: 31-0854434.

The Plan Number assigned to the Plan by Fifth Third is 001.

The Plan is for the exclusive benefit of the participants, and its assets do not belong to Fifth Third.

The Plan Type is defined contribution with a Section 401(k) feature. Portions of the Plan constitute a stock bonus plan and an employee stock ownership plan.

Benefits under the Plan are nonassignable. This means that you may not pledge or otherwise transfer your right to receive benefits. There is a detailed exception for qualified domestic relations orders.

Benefits will be paid under this Plan only if the plan administrator decides in its discretion that the applicant is entitled to them.

The Plan is administered by The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee as the plan administrator:

Fifth Third Bank
38 Fountain Square Plaza
MD 10AT41
Cincinnati, Ohio 45263
Telephone Number: 513-579-6162

The Plan Trustee is:

Fifth Third Bank
38 Fountain Square Plaza
Cincinnati, Ohio 45263

The Agent for Service of Legal Process is:

Fifth Third Bank
38 Fountain Square Plaza
Cincinnati, Ohio 45263

The Plan Year is the 12-month period beginning on January 1 and ending on December 31.

For more information regarding the Plan please contact My HR Direct at 1-877-694-7347.

While we hope you find My HR Direct useful, please understand that they are not the "plan administrator" and cannot commit the Plan, the plan administrator or Fifth Third to anything that is not in, the legal Plan documents or change the Plan in any ay. If you have a claim for benefits or wish to appeal a denial of a claim, you must follow the procedures below under the heading "Claims." My HR Direct has no authority to decide claims or appeals and nothing they say should be construed as a denial of a claim.

PARTICIPATION

Eligibility Requirements

Performance Reward Contributions and Rollovers.

When you first become an employee, you are eligible immediately to potentially share in Performance Reward Contributions -- there is no waiting period or minimum age (but, as discussed below, you generally must be employed on the last day of the plan year to receive a Performance Reward Contribution). You are also eligible immediately to make a rollover from another tax-qualified plan. These types of contributions are discussed below.

401(k), Match and After-Tax Contributions.

After you have credit for 30 days of eligibility service, you will be eligible to begin making 401(k) deferrals, voluntary after-tax contributions and to receive

employer matching contributions. This eligibility will commence with the first pay date *following* your completion of 30 days of eligibility service. These types of contributions also are discussed below.

If you terminate service with the employer after completing 30 days of eligibility service and are later reemployed, you will be eligible to make 401(k) deferrals, voluntary after-tax contributions and to receive employer matching contributions on the date on which you again become an employee (provided you still have credit for 30 days of eligibility service).

Employee

In order to be eligible, you must be an employee of Fifth Third (including any affiliate which is a participating employer under the Plan). Independent contractors, leased employees, employees of temporary agencies, non-resident aliens and employees whose position is located primarily outside the United States are not eligible. Any individual that Fifth Third does not consider to be an employee for purposes of the Plan is not eligible even if the individual is considered to be an employee for other purposes such as employment tax purposes.

Eligibility Service

Your eligibility service begins when you start working for Fifth Third. In addition, your eligibility service includes the period of time you spend in certain military service if you return to work at the end of the service. Your eligibility service stops when you die, retire, quit, or are discharged, or after 12 months of absence for any other reason. However, if you return to work within 12 months after the beginning of any

absence, then the absence will be included in your eligibility service.

CONTRIBUTIONS AND ACCOUNTS

Accounts

A participant may have one or more of the following Accounts to reflect contributions currently available under the Plan:

- Section 401(k) Salary Deferral Account
- Age 50 Catch-Up Account
- Post-2003 Employer Matching Account
- Performance Reward Account
- After-Tax Account
- Rollover Account

A Participant may also have one or more of the following accounts to reflect contributions previously allowed under the Plan:

- Pre-2004 Employer Matching Account
- Profit Sharing Account
- Frozen Cash Election Account
- Frozen Vesting Account

Some participants may have additional Accounts that reflect funds merged into the Plan from certain predecessor plans. See the section entitled **Special Provisions for Certain Predecessor Plans and Affiliates.**

The amount of your benefit will depend on the value of your Accounts. Your Accounts are for bookkeeping purposes only, and you can receive money from the Plan only as provided by the Plan.

The different types of Accounts reflect the different types of contributions that are either allowed now or have been allowed in the past under the Plan.

401(k) Deferrals

After you have credit for 30 days of eligibility service, you may direct your employer to make contributions from your eligible compensation directly to the Plan, for allocation to your Section 401(k) Salary Deferral Account. Your eligible compensation is generally the same as that described below under the heading "Meaning of Compensation" but there are a few differences. Variable compensation is not eligible but 401(k) deferrals are taken from other performance-based additional cash compensation incentives. Federal and state income tax will not be withheld on these contributions, but they will be subject to Social Security tax and may be subject to local income tax. Subject to the limits imposed by law or the plan administrator, you may contribute any percent for any pay period out of your eligible compensation as either 401(k) or voluntary after-tax contributions.

No more than $225,000 (for the 2007 Plan Year, as adjusted for inflation and increases prescribed by law) of compensation may be taken into account for 401(k) contributions. This means that if and when your eligible compensation reaches the $225,000 (as adjusted) limit, your 401(k) contributions, voluntary after-tax contributions and matching contributions will stop.

Federal law imposes an annual dollar limit on the amount of compensation you may defer. Under this limit, the amount you defer on a pre-tax basis may not

exceed $15,500 in 2007. That limit will be increased to adjust for inflation in future years. When you reach the adjusted $15,500 pre-tax limit, your 401(k) pre-tax deferrals automatically "flip" to after-tax contributions. The rate of after-tax contributions generally will be the same as the rate of your 401(k) pre-tax deferrals at the time of the "flip" except a "highly compensated employee's" rate will generally be limited to 4%. These after-tax contributions will be eligible for the company match. You may discontinue this after tax deduction at any time by logging on to Retire.53.com and changing your pre-tax contribution rate to 0%. You will no longer receive the company match if you discontinue these contributions.

Beginning with the plan year in which you attain age 50, you may make catch-up contributions to your Age 50 Catch-Up Account in excess of the normal 401(k) contribution limits or any of the limits that keep you from making regular 401(k) contributions. Catch-up contributions do not count toward these limits. Catch-up contributions are not eligible for the employer matching contributions described below (this includes catch-up contributions that are later recharacterized as regular 401(k) contributions). Federal law imposes annual limits on the amount of catch-up contributions you may make, and these limits may vary from year to year. The limit for 2007 is $5,000. See the plan administrator for the limits in effect for a particular year.

Section 401(k) deferrals under the Plan provide you with a tax-sheltered way to save for retirement. You do not pay federal or state income taxes on deferred amounts or investment gains until your Account is paid

to you from the Plan. Thus, you benefit in two ways. First, since deferred amounts are not subject to federal and state income tax, your current taxes are lower. Second, the deferred amounts can grow faster than if investment gains were taxed currently.

Your 401(k) deferral agreement remains in effect until you modify or terminate it. The plan administrator may prescribe rules governing the election, modification and termination procedures. In addition, in order to satisfy the complex regulations governing the Plan, the plan administrator may further limit your contributions or make distributions to you if it is determined that excess contributions were made.

The ability to make 401(k) deferrals may be restricted to those participants whose compensation is paid through the Fifth Third payroll system.

Voluntary (After-Tax) Participant Contributions

In addition to your ability to make 401(k) contributions, you may make voluntary (after-tax) contributions to the Plan after you have credit for 30 days of eligibility service. Your contributions would not be tax deductible. Even if you make contributions through payroll deduction, the amounts contributed will be subject to full taxation as if paid directly to you. However, as the Plan is a tax-qualified plan, income taxes on any earnings would be deferred until you receive them.

Your voluntary contributions will be credited to your After-Tax Account.

The plan administrator may set limits on the amount of voluntary contributions you may make. Because of

complex rules governing this type of contribution, you may not be able to contribute as much as you like and you may be required to take a distribution of any excess contribution.

Employer Matching Contributions

After you have credit for 30 days of eligibility service, your subsequent 401(k) contributions (excluding catch-up contributions) will qualify for an employer matching contribution to your Post-2003 Employer Matching Account. Fifth Third's matching contributions for a pay period will be based on your 401(k) deferrals (excluding catch-up contributions) up to 4% of your eligible compensation for a pay period. The match will equal 100% of the first 4% of your deferrals for a pay period.

Deferring more than 4% in a pay period will not increase the match.

Example Assume you have $1,000 in eligible compensation per pay period. If you elect to defer 4% ($40), this $40 contribution will be matched 100%. Thus, your match for the pay period will be $40 (100% of $40).

If you are otherwise eligible for the employer matching contribution but your Section 401(k) contributions have "flipped" to after-tax contributions because you reached the adjusted $15,500 limit described above, you will still qualify for subsequent pay period matches by allowing the contributions to continue as after-tax contributions. This is the only circumstance in which voluntary after-tax contributions will be matched. Other elected voluntary after-tax contributions will not be matched.

As noted above, once your eligible compensation reaches the adjusted $225,000 limit, you will no longer be entitled to receive matching contributions for the year (or to make 401(k) contributions or after-tax contributions).

Performance Reward Contributions

You are eligible to have an allocation to your Performance Reward Account for a plan year if you fit any of the following descriptions:

(1) you were employed by Fifth Third on the last day of the plan year (December 31);

(2) you were on an approved leave of absence on the last day of the plan year and you received compensation from Fifth Third for the plan year; or

(3) your employment terminates during the plan year because of death, disability, or retirement (at or after age 55 and completion of 5 vesting years).

For each plan year, the board of directors of Fifth Third Bancorp determines the total amount (if any) to be contributed for allocation under the Plan as a Performance Reward Contribution. If you are eligible, your allocation will be expressed as a percentage of your annual compensation (defined below) for the plan year. That percentage is the same for all eligible participants.

Your allocation shall be credited to your Performance Reward Contribution Account.

Meaning of Compensation

For purposes of making Performance Reward Contribution allocations under the Plan, annual compensation generally means the remuneration (before reduction for withheld amounts) an employee receives from Fifth Third during a plan year, in the form of base wages or salary. The following amounts are also included:

- overtime
- variable compensation and similar compensation.

The following amounts are among those that are excluded:

- payments made pursuant to product-focused incentive plans
- tuition refund reimbursement
- Benefit Choice Dollars
- deferrals under the Nonqualified Deferred Compensation Plan
- similar payments and benefits

Performance-based additional cash compensation incentives (other than variable compensation) shall be excluded unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all employees or all non-highly compensated employees covered by the incentive program.

Amounts otherwise meeting this definition that a participant would have received but for 401(k) contributions under the Plan, compensation reduction contributions under the Fifth Third Bank 125 Plan or pursuant to a Code Section 132(f)(4) qualified transportation arrangement are included.

No more than $225,000 (for the 2007 Plan Year, as adjusted for inflation and increases prescribed by law) of compensation may be taken into account for any participant for any plan year.

Profit Sharing Account

This Account reflects contributions of Profit Sharing allocations for plan years after 1996 and before 2004, if any, and any forfeitures allocated with such contributions.

Pre-2004 Employer Matching Account

This Account reflects the employer matching contributions for plan years before 2004.

Frozen Cash Election Account

This Account reflects contributions of the elective percentage of Profit Sharing allocations for plan years before 1997, if any.

Frozen Vesting Account

This Account reflects employer contributions for plan years before 1997 of that portion of each participant's Profit Sharing allocation which exceeded his Elective Percentage and forfeitures allocated thereto, if any.

Rollover Contributions

While employed by Fifth Third, you may contribute to the Plan a distribution you receive from an eligible retirement plan if the distribution qualifies as a rollover amount under the Internal Revenue Code. You may not rollover amounts attributable to deductible employee contributions, after-tax employee contributions or traditional Individual Retirement Account (IRA) contributions. Any rollover contribution shall be contributed to your Rollover Account.

VESTING

You will be entitled to benefits under the Plan only to the extent that you are vested. To have a vested right, or a nonforfeitable right, to part or all of an Account means that you have an unconditional right which is legally enforceable against the Plan. However, vesting does not guarantee the value of your Account against investment losses.

Fully Vested Accounts

Your rights to any of the following Accounts are fully vested at all times:

After-Tax Account

Rollover Account

Frozen Cash Election Account

Section 401(k) Salary Deferral Account

Age 50 Catch-Up Account

Profit Sharing Account (subject to the limited forfeiture for competition or dishonesty exception (see below)) and

Pre-2004 Employer Matching Account (subject to the limited forfeiture for competition or dishonesty exception (see below))

Performance Reward Account

At Normal Retirement Age. You are fully vested in your Performance Reward Account if you are employed by Fifth Third at Normal Retirement Age. "Normal Retirement Age" means the date on which you both reach age 65 and have completed 5 vesting years or attained the fifth anniversary of the time you began participation in the Plan.

Before Normal Retirement Age, Death or Disability. Your rights to your Performance Reward Account shall become nonforfeitable according to the following vesting schedules, as applicable:

The amounts credited to your Performance Reward Account attributable to contributions for plan years before 2007 shall become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 5	0	100
5 or more	100	0

The amounts credited to your Performance Reward Account attributable to contributions for plan years

2007 and later shall become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Post-2003 Employer Matching Account

At Normal Retirement Age. You are fully vested in your Post-2003 Employer Matching Account if you are employed by Fifth Third at Normal Retirement Age.

Before Normal Retirement Age, Death or Disability. Your rights to your Post-2003 Employer Matching Account become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Frozen Vesting Account

At Normal Retirement Age. You are fully vested in your Frozen Vesting Account if you are employed by Fifth Third at Normal Retirement Age.

Before Normal Retirement Age, Death or Disability. Subject to the limited forfeiture for competition or dishonesty exception (see below), your rights to your Frozen Vesting Account become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3	30	70
4	40	60
5	60	40
6	80	20
7 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Vesting Years

A vesting year is 365 days of service (whether or not continuous). You get credit for service until you die, retire, quit, or are discharged, or until the end of 12 months of absence for any other reason. However, if you return to work within 12 months after the beginning of an absence, then the absence will be included in your service. Service with Fifth Third Bank and other affiliates of Fifth Third Bancorp

(commencing with the date of affiliation) counts. Certain military service also counts as vesting service if you return to work at the end of the service.

In addition, Fifth Third employees who became employees as a result of an acquisition generally receive credit for service under this Plan for service with their predecessor employer as listed below:

- ACI Merchant Services, Inc.
- Bank One, National Association
- Bank of Ashland, Inc.
- Capital Bank, N.A.
- Card Management Corporation
- CitFed Bancorp, Inc. and Subsidiaries
- Citizens Heritage Bank, National Association
- CNB Bancshares, Inc. and Subsidiaries
- Commercial National Bank
- Decatur County Bank
- Enterprise Federal Savings Bank
- First Nationwide Bank
- Franklin Financial Corporation and Subsidiaries
- Gateway Leasing Corporation
- Great Lakes National Bank, Ohio, N.A.
- Heartland Capital Management, Inc.
- Integrated Delivery Technologies, Inc.
- Kentucky Enterprise Bank, FSB
- The Ohio Company
- Ottawa Financial Corporation (and Subsidiaries)
- Peoples Bank Corporation of Indianapolis (and Subsidiaries)
- Resource Management, Inc. (dba Maxus Investment Group)
- South Florida Bank
- State Savings Company and Subsidiaries

- Strongsville Savings Bank
- USB, Inc.
- Van guard Financial Company
- W. Lyman Case & Company

Additionally, service taken into account for vesting purposes under the following predecessor plans generally counts as vesting service under this Plan:

- Boone State Bank Profit Sharing Plan
- Falls Savings Bank, F.S.B., Salary Savings Plan
- Financial Institutions Thrift Plan (as adopted by the Cumberland Federal Savings Bank)
- The First-Mason Bank Employees' Profit Sharing Plan
- First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan
- First National Bankshares of Florida, Inc. Salary Savings Plan
- Mutual Federal Savings Bank Retirement Savings Plan
- NBD Bancorp, Inc. Employees' Savings and Investment Plan
- New Palestine Bank Employees' 401(k) Plan
- Old Kent Thrift Plan (See the section entitled Old Kent Financial Corporation and Subsidiaries under Special Provisions for Certain Predecessor Plans and Affiliates, below, for special rules.)

Specific rules for determining and counting service with predecessor employers and under predecessor plans are set forth in the Plan document and the plan administrator's application of the service counting provisions is binding and conclusive on all parties.

Forfeiture Resulting From Break In Service

If you incur a break in service (see the section entitled Breaks in Service and Re-Employment), then you will forfeit, or lose, the forfeitable percentage of your Frozen Vesting Account, Performance Reward Account and Post-2003 Employer Matching Account.

Forfeiture Resulting From Cash-Out

Even if you do not incur a break in service, you can forfeit the forfeitable part of your Frozen Vesting Account, Performance Reward Account and Post-2003 Employer Matching Account if you have received a distribution of your entire vested interest. The forfeiture applies only if the distribution is $5,000 or less or you voluntarily elect to receive it. If you have no vested interest, then your non-vested interest will be immediately forfeited upon your termination of service. The forfeiture can be avoided if you again become covered by the Plan and repay the distribution (if any) to the Plan before the earlier of incurring break in service or the fifth anniversary of your return to employment

Forfeiture for Competition or Dishonesty

You will forfeit all of your Frozen Vesting Account, your Pre-2004 and Post-2003 Employer Matching Account, and your Profit Sharing Account if the Executive Committee of your employer determines that you have either

(1) committed an act of dishonesty against or with respect to Fifth Third, any customer or other person with whom Fifth Third deals, or

(2) entered into competition with Fifth Third either directly or indirectly as an officer, employee, agent or consultant.

This forfeiture rule applies only if you have credit for less than 5 years of vesting service and your employment with Fifth Third terminates prior to Normal Retirement Age.

Death After Termination of Employment

If you die after the termination of your employment, then any forfeitable amount in your Account will be forfeited.

Allocation of Forfeitures

Forfeitures occurring during a plan year are first applied to the restoration of previous forfeitures under the cash-out rules described above and then are applied to the reduction of the employer's contributions (either Matching Contributions or Performance Reward Contributions, as determined by the employer).

ACCOUNT INVESTMENTS

In General

The plan assets are held in trust, and you may direct the investment of all of your Accounts from among the investment choices available under the Plan. The plan administrator directs the Trustee as to which investment funds to make available, including the Fifth Third Stock Fund. The plan administrator establishes the procedures for making and changing investment elections.

Employer matching contributions will be made initially into the Fifth Third Stock Fund. Although you may not direct that the matching contributions be made to any of the other investment funds, after a matching contribution is credited to your Post-2003 Employer Matching Account, you may direct that such amounts be moved from the Fifth Third Stock Fund to other investment choices available under the Plan.

Under current procedures, statements of Account are provided to participants quarterly and, in addition, a participant can access Account information any time at Retire.53.com.

The Fifth Third Stock Fund and Dividend Pass-Through

The Fifth Third Stock Fund is invested primarily in shares of common stock of Fifth Third Bancorp. The fund may also be invested in short-term liquid investments. Participants whose Accounts are invested in the Fifth Third Stock Fund shall be entitled to vote the shares represented by such interests in the fund. Participants whose Accounts are invested in the Fifth Third Stock Fund may elect to leave dividends payable on the Fifth Third common stock in the Plan for reinvestment in Fifth Third common stock or to take the dividends in cash. The plan administrator establishes the rules for making this election.

Trust Income

Your Accounts are periodically adjusted to take account of the trust's income and any losses, as well as increases or decreases in value of the trust's assets. These adjustments are made on the basis of the size of

your Accounts in the particular investment option in proportion to the total value of all Accounts therein.

Plan Expenses

Expenses allocable to your Accounts will be deducted from your Accounts. This could include, for example, fees for plan loans, withdrawals, distributions, or qualified domestic relations orders.

Plan Loans

You may make a written application to the plan administrator for a loan from the Plan from your Section 401(k) Salary Deferral Account, Age 50 Catch-Up Account, Frozen Cash Election Account, Rollover Account (or a predecessor plan account attributable to 401(k) deferrals or rollover contributions).

You must use 50% of your vested Account as security for the loan. A loan is treated as an investment in your Account. Interest payments and principal repayments go back into your Account. Any outstanding loans are due and payable upon your termination of employment.

You will have to pay any administrative costs in connection with the loan. You will have to pay a reasonable rate of interest and agree to repay the loan within no more than 5 years through payroll withholding with equal or roughly equal payments.

Loan Conditions

There are a number of conditions applicable to plan loans.

(1) All loans are repaid through payroll deduction.

(2) The minimum amount for any single loan is $1,000.

(3) You may have no more than one loan outstanding at any given time.

(4) The amount available to be loaned is limited to the least of:

a. $50,000, reduced by the excess, if any, of your highest outstanding balance of loans from the Plan during the 1-year period prior to the date of the loan over your current outstanding balance of loans; or

b. one-half (½) of the value of your vested Account balance; or

c. the balance of your Section 401(k) Salary Deferral Account, Age 50 Catch-Up Account, Frozen Cash Election Account and Rollover Account (and any predecessor plan account attributable to 401(k) deferrals or rollover contributions).

The interest you pay on your plan loan may not be tax deductible. There are general tax law limitations on the deductibility of interest as well as specific limitations on loans from qualified retirement plans. If you are interested in a tax deduction, you should consult a tax advisor familiar with the Plan for assistance.

HARDSHIP WITHDRAWALS

In accordance with rules prescribed by the plan administrator, you may withdraw amounts first from your Rollover Account and then from your Section 401(k) Salary Deferral Account and Age 50 Catch-Up

Account in the event of hardship, except to the extent you have secured a plan loan with these Accounts. The total of such withdrawals from your Section 401(k) Salary Deferral Account and Age 50 Catch-Up Account may not exceed the total amount of your 401(k) contributions. Earnings may not be withdrawn and no part of any employer contributions may be withdrawn. A hardship withdrawal is allowed only if the withdrawal is necessary to satisfy an immediate and heavy financial need due to one of the following:

- to pay for needed or previously incurred medical expenses for you, your spouse or your dependents;
- the purchase of your primary residence (mortgage payments are excluded);
- to pay tuition and related educational fees for the next 12 months of post-secondary education for you, your spouse or your dependents;
- to avoid foreclosure on, or eviction from, your principal residence;
- payments for burial or funeral expenses for your deceased parent, spouse, children or dependents; or
- expenses for the repair of damage to your principal residence that would qualify for the casualty deduction under Federal tax law (determined without regard to whether the loss exceeds 10% of adjusted gross income)

Documentation of the applicable circumstance will be required. The amount of the withdrawal may not exceed the amount required to satisfy the specific need.

The hardship withdrawal is considered necessary only if the plan administrator (or its delegate) determines in its sole and absolute discretion that, based on your representations (unless the plan administrator has actual knowledge to the contrary), the need cannot be relieved by any of the following:

- reimbursement or compensation by insurance, or otherwise;
- reasonable liquidation of your assets and the assets of your spouse and minor children (except for such assets which are held under an irrevocable trust or under the Uniform Gifts to Minors Act) to the extent such liquidation itself would not cause an immediate and heavy financial need;
- discontinuance of 401(k) contributions and voluntary (after-tax) participant contributions;
- any available distributions, loans or dividend pass-through elections from all plans maintained by the employer or by another employer; or
- loans from banks or other commercial lenders.

Any hardship withdrawal which is granted shall be paid as soon as administratively feasible after the trustee's receipt of notice of the withdrawal. A request for withdrawal can be made only once per plan year quarter.

WITHDRAWAL OF VOLUNTARY (AFTER-TAX) PARTICIPANT CONTRIBUTIONS

In accordance with rules prescribed by the plan administrator, you may withdraw amounts from your After-Tax Account without proof of hardship. Any withdrawal shall be paid as soon as administratively feasible after the trustee's receipt of notice of the withdrawal. A request for withdrawal can be made only once per plan year quarter.

You should consult your tax advisor regarding the tax treatment of any withdrawals from the Plan.

RETIREMENT BENEFITS

The Plan is for your retirement. Although you may withdraw your Rollover Account and 401(k) contributions in the event of hardship and otherwise withdraw from your After-Tax Account, your benefits generally do not start until after you retire or otherwise terminate your employment with Fifth Third.

Amount

The amount of your benefit will depend on the cash value of the vested part of your Accounts as determined by the plan administrator under the Plan's valuation procedures. If your employment terminates, then your Accounts will generally be available to you as soon as administratively feasible.

When Your Benefit Starts

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) exceed $5,000, then, upon your termination of employment, you generally

have the right to commence your distribution as soon as administratively feasible following your termination of employment.

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) exceed $5,000, then you have the right to defer the commencement date of your distribution. Nevertheless, the distribution of your Accounts must begin by April 1 of the calendar year following the later of the calendar year in which you attain age 70-1/2 or the calendar year in which you retire. If you have not already elected to start benefit payments, they will commence automatically as of that date.

The plan administrator has the right to delay your distribution (or a distribution on your death) for up to 12 months in order to investigate whether the provision for forfeiture for dishonesty or competition is applicable in your case (see the section on Forfeiture for Competition or Dishonesty).

Cash-Out Distributions

Once your Accounts become distributable (on account of termination of employment), if your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) are $5,000 or less, then your Accounts (including your Rollover Account and any other subaccount from a merged plan holding rollovers) will be distributed automatically in a single sum as soon as administratively feasible. However, you will be given 30 days to elect either a payment to you or a direct rollover if your vested Account is at least $200. Also, if

your Accounts are invested in the Fifth Third Stock Fund, during an election period prescribed by the plan administrator, you may elect to have whole shares of Fifth Third Bancorp stock distributed to you, with the remainder of the distribution in cash.

If you do not make a valid election within the applicable election period, your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) will be paid automatically as follows:

- if your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) does not exceed $1,000, then it will be paid in cash subject to applicable withholding.

- if your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) exceeds $1,000, then it will be distributed in an automatic rollover to an individual retirement account ("IRA") with Fifth Third Bank.

The assets in the IRA shall initially be invested in a Fifth Third Bank investment fund which is designed to preserve principal and provide a reasonable rate of return and liquidity (such as an interest-bearing account, a certificate of deposit or a money market fund). Note that the IRA's initial investment may be Fifth Third Bank's own proprietary investment product. Fifth Third Bank will charge your IRA for annual maintenance fees. Yon can transfer the assets in this IRA to another IRA at any time and without cost.

You may contact the plan administrator if you have questions regarding the Plan's automatic rollover provisions or Fifth Third Bank IRAs, including IRA investment options, fees and expenses.

Forms of Payment

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) exceed $5,000, then you may elect payment in one of the following forms:

- a single sum; or
- periodic installment payments, with any amounts remaining unpaid at your death to be paid to your beneficiary

If you elect a single sum distribution and if, pursuant to your investment election, you have Accounts invested in the Fifth Third Stock Fund, you may elect to have whole shares of Fifth Third Bancorp stock distributed to you, with the remainder of the distribution in cash. Such an election must be in accordance with the rules and procedures of the plan administrator. In the absence of a valid election, your payment would be in cash.

DIRECT ROLLOVER

To the extent a payment you would receive under the form of payment you select qualifies as an "eligible rollover distribution" you may have the right to direct that the payment be made directly to your IRA (individual retirement account or annuity), an annuity plan described in 403(a) of the Code, an annuity contract described in Section 403(b) of the Code, an

eligible plan sponsored by a state or local government employer, or another employer's qualified retirement plan. A payment which qualifies as an "eligible rollover distribution" but which you decide to take instead of having transferred typically will be subject to mandatory 20% federal income tax withholding. Most single sum payments and installment payments over a period of less than 10 years will qualify as eligible rollover distributions."

The direct rollover may be accomplished by providing you with a check made payable to the eligible retirement plan for you to provide to the eligible retirement plan.

Hardship withdrawals cannot qualify as eligible rollover distributions. There are a number of other exceptions and special rules. For further information, see the plan administrator.

DEATH BENEFITS

If you die before the commencement of your benefit payments, then the Plan provides death benefits equal to the value of your vested Account balances. If you die while employed by Fifth Third, and if you are not already fully vested, then you will become fully vested.

The death benefit will be paid to your beneficiary. You may designate a beneficiary by filing a form with the plan administrator. If you designate someone other than your spouse as your beneficiary, then your spouse must give notarized consent.

DISABILITY

If your service terminates during a plan year due to a disability, you will still be entitled to a Performance Reward allocation for that plan year. Also, if, while working for Fifth Third, you become disabled, and if you are not already fully vested, then you will become fully vested.

For this purpose, disability means an incapacity caused by bodily injury or disease which prevents an employee from performing his regular duties, based upon medical evidence satisfactory to the plan administrator. The plan administrator has the sole, absolute and uncontrolled discretion to determine whether or not a disability exists in a particular case.

QUALIFIED DOMESTIC RELATIONS ORDERS

A participant's Account may be assigned in whole or in part to his or her spouse (or certain other qualified "alternate payees") pursuant to a divorce or dissolution. In order for an attempted assignment to be valid, the order making the assignment must constitute a "qualified domestic relations order." The requirements of a qualified domestic relations order are quite complex. To assist participants (and their attorneys) who are contemplating a division of Plan benefits pursuant to a divorce or dissolution, the plan administrator has developed a Model Qualified Domestic Relations Order. To obtain a copy of the Model and other pertinent information contact the plan administrator. Plan participants and beneficiaries can obtain, without charge, a copy of the Plan's procedures governing determination of qualified domestic relations order procedures from the plan administrator.

The Plan allows a qualified domestic relations order to require an immediate single sum distribution of the amount assigned to the participant's spouse or other alternate payee. If an order so provides, the single sum will be paid as soon as administratively feasible after the plan administrator determines its qualified status (even if the participant remains employed). If an order specifies any other form or time of distribution, it cannot commence until the participant's benefit would begin under the Plan or as required by law.

Reasonable expenses attendant to the determination and administration of a qualified domestic relations order will be charged to the affected participant's Account. It is acceptable for the qualified domestic relations order to require the alternate payee to share in a specified portion of such expenses. It is expected that the expenses incurred will be lower if the parties and their attorneys use the Model as the basis for drafting a qualified domestic relations order and if care is taken in tailoring the Model to the participant's circumstances. Incorrect cross-references, impermissible directions, ambiguous provisions and the like will increase the expenses charged to the participant's Account.

BREAKS IN SERVICE AND RE-EMPLOYMENT

A break in service is a period of severance of employment of at least 72 consecutive months; however, you are not charged with a break for certain approved leaves of absence or certain military service if you return to work at the end of the leave or service.

One consequence of incurring a break in service is that if you are re-employed, your prior service may no longer count. This would occur only if:

- you were not vested in any part of your Account attributable to employer contributions and
- if the break was at least as long as your prior service.

If you are re-employed after a break and your prior service is disregarded, then you will be treated as a new employee.

SUSPENSION OF BENEFITS ON RE-EMPLOYMENT

If you are re-employed after becoming entitled to a benefit, then your benefit may be suspended.

SUMMARY OF CIRCUMSTANCES WHICH MAY CAUSE LOSS OF BENEFITS

The following is a summary of some of the circumstances, described in the preceding pages, that may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of benefits:

(1) If you incur a break in service, you will forfeit the forfeitable portion of your Account. In addition, if you are later re-employed, your prior service may not count.

(2) If you are not employed by Fifth Third at the end of the year, you will not receive a Performance Reward allocation unless, during the year you died, became disabled, retired (after age 55 and completion of 5

vesting years), or were on an employer approved leave of absence.

(3) The amount that may be contributed by or for you may be limited because of tax rules.

(4) If you receive your entire vested interest before a break in service, you may forfeit the forfeitable percentage of your Account.

(5) If you die after the termination of your employment, you may forfeit the forfeitable percentage of your Account.

(6) You may forfeit your Frozen Vesting Account, your Pre-2004 and Post-2003 Employer Matching Account, and your Profit Sharing Account because of dishonesty or competition with Fifth Third.

TOP HEAVY PLANS

Federal law requires the Plan to contain certain rules that would apply if the Plan were to become "top heavy." The Plan is not currently top heavy and although it is highly unlikely that it will ever become top heavy, the Plan must say what would happen if it were to become top heavy. The rules are very complex, but plans are generally top heavy if more that 60 percent of the Account balances belongs to certain key employees.

If the Plan were top heavy, certain minimum contributions would be required (the amount typically contributed in recent years far exceeds the minimum amount that would be required). In addition, vesting in your Frozen Vesting Account would be over a two-to-six

year period and vesting in your Performance Reward Account would be 100 percent after 3 vesting years (and zero before). The employer will let you know if the Plan is top heavy.

PLAN AMENDMENT AND TERMINATION

Fifth Third expects the Plan to be permanent but Fifth Third Bank, by action of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has the right to terminate the Plan at any time on behalf of all of the Fifth Third Bancorp Affiliates. If the Plan should happen to terminate while you are still employed, you would automatically become vested in any forfeitable part of your Accounts.

The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee or the Chairman of such Committee may amend the Plan at any time on behalf of all of the Fifth Third Bancorp Affiliates.

The Employee Retirement Income Security Act of 1974 (ERISA) established the Pension Benefit Guaranty Corporation to guarantee the benefits under the certain plans. This Plan is not covered by that program. You will receive the full value of your vested interest as of the appropriate valuation date.

CLAIMS

Making a Claim

The plan administrator has the power and authority in its sole, absolute and uncontrolled discretion to manage and interpret the Plan and, in particular, to determine who is entitled to a benefit and the amount of the benefit. However, if you have a complaint regarding the

nonpayment of all or part of a Plan benefit, you or your duly authorized representative may mail or deliver a letter stating your complaint to the person or office responsible for Fifth Third's employee benefits. Using this claims procedure (and the claims review procedure described below) is required before you may file a lawsuit regarding the Plan or your benefit under the Plan.

The Claims Review Committee will decide upon a claim within a reasonable period of time, but in no more than 90 days, unless special circumstances require an extension of time. If an extension of time is required, you will be notified prior to the end of the original, 90 days, including the date a decision is expected.

Review of a Denied Claim

If you receive notice that your claim has been wholly or partially denied or if you have heard nothing about your claim for 90 days, you or your duly authorized representative may, within 60 days or otherwise reasonable time, review pertinent documents, submit issues and comments in writing, and obtain a full and fair review by mailing or delivering a written request to the person or office responsible for Fifth Third's employee benefits. If you do not request a review within the specified time period, the denial of the claim will be binding and you may not later challenge that denial.

If you request a review, then the Claims Review Committee will make a decision no later than 60 days after receiving your request for review, unless special circumstances require an extension of time for processing. If such an extension is required, you will be

notified prior to its commencement. In any event, the decision will be made as soon as possible, but not later than 120 days after receipt of your request.

The Claims Review Committee shall have the sole, absolute and uncontrolled discretion to decide all claims under the initial claims procedure and under the claims review procedure, and its decisions shall be binding on all parties.

Required Exhaustion of Administrative Remedies

Before you may file a lawsuit regarding the Plan or your benefits under the Plan, you must first use the claims procedures and the claims review procedures (including the requirement of a timely request for review) described above.

STATEMENT OF ERISA RIGHTS

As a participant in the Plan, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

(1) Examine, without charge, at the plan administrator's office and at other specified locations, all plan documents, including copies of all documents filed by the Plan with the U. S. Department of Labor, such as detailed annual reports and plan descriptions.

(2) Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The plan

administrator may make a reasonable charge for the copies.

(3) Receive a summary of the Plan's annual financial report. The plan administrator is required to furnish each participant with a copy of this summary annual report.

(4) Obtain a statement telling you whether you have a right to receive a benefit at normal retirement age (age 65 with 5 years of vesting service or other age as specified for a predecessor plan) and if so, what your benefits would be at normal retirement age if you stop working under the Plan now. If you do not have a right to a benefit, then the statement will tell you how many more years you have to work to get a right to a benefit. This statement must be requested in writing and is not required to be given more than once a year. The Plan must provide the statement free of charge.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the plan. The people who operate the Plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA. If your claim for a benefit is denied in whole or in part, you must receive a written explanation of the reason for the denial. You have the right to have the Plan review and reconsider

your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the Plan and do not receive them within 30 days, then you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the plan administrator. If you have a claim for a benefit which is denied or ignored, in whole or in part, then you may file suit in a state or federal court provided you first have exhausted all administrative remedies. In addition, if you disagree with the Plan's decision or lack thereof concerning the qualified status of a domestic relations order, you may file suit in federal court provided you first have exhausted all administrative remedies. If it should happen that plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, then you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court provided you first have exhausted all administrative remedies. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous. If you should have any questions about this statement or your rights under ERISA, then you should contact the nearest office of the Pension and Welfare Benefits Administration, U. S. Department of Labor listed in your telephone directory or the Division of Technical Assistance and Inquiries, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue N.W.,

Washington, D. C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Pension and Welfare Benefits Administration. If you have any questions about the Plan, then you should contact the plan administrator.

SPECIAL PROVISIONS FOR CERTAIN PREDECESSOR PLANS AND AFFILIATES

Special rules apply to employees of certain Fifth Third Affiliates. Only the participants specified below are affected by the special provisions.

Boone State Bank Profit Sharing Plan

Participants who participated in the Boone State Bank Profit Sharing Plan may have special Accounts maintained on their behalf known as the Boone State Account. A participant's Boone State Account reflects his account under the Boone State Bank Profit Sharing Plan as of the date that plan merged into this Plan, adjusted for subsequent gains and losses. A participant's Boone State Account is subject to the same vesting schedule described above applicable to the Frozen Vesting Account.

In accordance with rules prescribed by the plan administrator, you have investment rights over your Boone State Account. Your investment rights over these accounts are the same as your investment rights over your other Accounts (described above under Account Investments).

First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan

Participants who had amounts transferred from the First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan (the "First Ohio Plan") may have special Accounts maintained on their behalf known as the Toledo Matching Account (which is attributable to a transfer from the participant's "Employer Matching Contribution Account" under the First Ohio Plan).

Your rights to the Toledo Matching Account are fully vested at all times.

In accordance with rules prescribed by the plan administrator, you have investment rights over your Toledo Matching Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

New Palestine Bank Employees' 401(k) Plan

Participants who participated in the New Palestine Bank Employees' 401(k) Plan (the "New Palestine Plan") may have special Accounts maintained on their behalf known as the New Palestine Account. The New Palestine Account reflects a participant's interest attributable to his "Regular Account" under the New Palestine Plan as of the date that plan merged into this Plan, adjusted for subsequent gains and losses. Your rights to the New Palestine Account are fully vested at all times.

In accordance with rules prescribed by the plan administrator, you have investment rights over your

New Palestine Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

The Cumberland Federal Savings Bank's Participation in The Financial Institutions Thrift Plan

Special Accounts

Participants who had amounts transferred from the Financial Institutions Thrift Plan (the "FITP") may have special Accounts maintained on their behalf known as the Cumberland Account, consisting of one or more of the following subaccounts:

Cumberland Regular Account (which is attributable to a transfer from the participant's "Regular Account" under the FITP)

Cumberland 401(k) Account (which is attributable to a transfer from the participant's "401(k) Account" under the FITP)

Cumberland Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" under the FITP)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your Cumberland 401(k) Account, Cumberland Rollover

Account and your Cumberland Regular Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may make a withdrawal from your Cumberland 401(k) Account (excluding earnings and employer contributions). After attainment of age 59-1/2, you may withdraw from your Cumberland 401(k) Account. You may elect to withdraw any part or all of your Cumberland Regular Account and Cumberland Rollover Account. Only one such withdrawal may be made in any quarter.

Mutual Federal Savings Bank Retirement Savings Plan

Special Accounts

Participants who participated in the Mutual Federal Savings Bank Retirement Savings Plan (the "Mutual Federal Plan") may have special Accounts maintained on their behalf known as the Mutual Federal Account (attributable to a participant's "Account" under the Mutual Federal Plan) consisting of one or more of the following subaccounts:

Mutual Federal Discretionary Contribution Account (which is attributable to any discretionary employer contributions and forfeitures allocated to the participant under the Mutual Federal Plan)

Mutual Federal 401(k) Account (which is attributable to a participant's "Elective Deferral Contributions" under the Mutual Federal Plan)

Mutual Federal Matching Contribution Account (which is attributable to any "Matching Contributions" allocated to the participant under the Mutual Federal Plan)

Mutual Federal Rollover Account (which is attributable to a participant's "Rollover Contributions" (if any) under the Mutual Federal Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Mutual Federal Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Mutual Federal 401(k) Account (excluding earnings) and your Mutual Federal Rollover Account.

Falls Savings Bank, FSB
Salary Savings Plan

Special Accounts

Participants who participated in the Falls Savings Bank, FSB Salary Savings Plan (the "Falls Savings Plan") have their benefits from the Falls Savings Plan reflected in a "Falls Savings Account," consisting of one or more of the following subaccounts:

Falls Savings Discretionary Contribution Account (which is attributable to any discretionary employer contributions allocated to the participant under the Falls Savings Plan)

Falls Savings 401(k) Account (which is attributable to a participant's "Elective Contributions" under the Falls Savings Plan)

Falls Savings Rollover Account (which is attributable to a participant's "Rollover Contributions" (if any) under the Falls Savings Plan)

Falls Savings Matching Contribution Account (which is attributable to a participant's "Matching Contributions" under the Falls Savings Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Falls Savings Account. Your investment rights

over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Falls Savings 401(k) Account (excluding earnings) and your Falls Savings Rollover Account.

NBD Bancorp, Inc.
Employees' Savings and Investment Plan

Special Accounts

Participants who had amounts transferred from the NBD Bancorp, Inc. Employees' Savings and Investment Plan (the "NBD Plan") may have special Accounts maintained on their behalf known as the NBD Account, consisting of one or more of the following subaccounts:

NBD Participant Contribution Account (which is attributable to a transfer from the participant's "Participant Contribution Account" under the NBD Plan)

NBD Matching Contribution Account (which is attributable to a transfer from the participant's "Matching Contribution Account" under the NBD Plan)

NBD Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" (if any) under the NBD Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire NBD Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your NBD Participant Contribution Account (excluding earnings) and your NBD Rollover Account. After attainment of age 59-1/2, you may withdraw any part or all of your NBD Account.

First Nationwide Employees' Investment Plan

Special Accounts

Participants who had amounts transferred from the California Federal Employees' Investment Plan (the "Cal Fed Plan") (formerly known as First Nationwide Employees' Investment Plan) may have special Accounts maintained on their behalf known as the Cal Fed Account, consisting of one or more of the following subaccounts:

Cal Fed Profit Sharing Account (which is attributable to a transfer from the participant's "Profit Sharing Account" under the Cal Fed Plan)

Cal Fed Salary Deferral Account (which is attributable to a transfer from the participant's "Salary Deferral Account" and "Prior Plan Salary Deferral Account" under the Cal Fed Plan)

Cal Fed Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" under the Cal Fed Plan)

Cal Fed Company Matching Account (which is attributable to a transfer from the participant's "Company Matching Account" and "Prior Plan Matching Account" under the Cal Fed Plan)

Cal Fed After-Tax Account (which is attributable to a transfer from the participant's "Prior Plan After-Tax Account" under the Cal Fed Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Cal Fed Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may make a withdrawal from your Cal Fed Salary Deferral Account (excluding earnings) and your Cal Fed

Rollover Account. After attainment of age 59-1/2, you may withdraw from your Cal Fed Account once per year. You may elect to withdraw any part or all of your Cal Fed After-Tax Account once every two years.

Fifth Third/The Ohio Company
and
Fifth Third Insurance Agency Corporation

The Ohio Company Profit Sharing Plan Accounts

Participants who participated in The Ohio Company Profit Sharing Plan (the "Ohio Company Profit Sharing Plan" may have special Accounts maintained on their behalf known as The Ohio Company Profit Sharing Account (attributable to a transfer from the participant's "Profit Sharing Account" under The Ohio Company Plan.) Your rights to your Ohio Company Profit Sharing Account are fully vested at all times. In accordance with rules prescribed by the plan administrator, you have investment rights over your Ohio Company Profit Sharing Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

After attainment of age 65, if you have not terminated employment you may withdraw any part or all of your Ohio Company Profit Sharing Account

Ohio Company Salary Investment Plan

Special Accounts

Participants who participated in The Ohio Company Salary Investment Plan ("Ohio Company SIP") have their benefits from the Ohio Company SIP reflected in

an "Ohio Company SIP Account," consisting of one or more of the following subaccounts:

Ohio Company SIP 401(k) Account (which is attributable to a Participant's "Deferral Contributions" under the Ohio Company SIP)

Ohio Company SIP Rollover Account (which is attributable to a Participant's rollover contributions (if any) under the Ohio Company SIP)

Ohio Company SIP Matching Contribution Account (which is attributable to any "Matching Contributions" allocated under the Ohio Company SIP)

Fully Vested Accounts

Your rights to your Ohio Company SIP Account (including each of its subaccounts) are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Ohio Company SIP Account (including each of its subaccounts). Your investment rights over these amounts are the same as your investment rights over your other Accounts (as described above under Account Investments.)

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Ohio Company SIP 401(k) Account

(excluding earnings) and your Ohio Company SIP Rollover Account.

If you have not terminated employment, you may make withdrawals from your Ohio Company SIP Matching Contribution Account. You may request such a withdrawal twice each plan year. The amount of such distribution may not be less than the lesser of (i) the balance of your distributable Ohio Company SIP Matching Contribution Account, or (ii) $500.

If you have not terminated employment, but you have withdrawn your Ohio Company SIP Matching Contribution Account, you may make withdrawals from the nonforfeitable portion of your remaining Ohio Company SIP Account if you have reached age 59-1/2. You may request such a withdrawal twice each plan year. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Ohio Company SIP Account, or (b) $500.

Citizens Federal Bank, F.S.B.

Special Accounts

Participants who participated in the Citizens Federal Bank, F.S.B. and Related Companies Amended and Restated Savings and Investment 401(k) Plan (the "Citizens Federal Plan") may have special Accounts maintained on their behalf known as the Citizens Federal Account (attributable to their accounts under the Citizens Federal Plan) consisting of one or more of the following subaccounts:

Citizens Federal Participant's Elective Account (which is attributable to a "Participant's Elective Account" under the Citizens Federal Plan)

Citizens Federal Participant's Account (which is attributable to a "Participant's Account" and "Restricted Stock Account" under the Citizens Federal Plan)

Citizens Federal Participant's Rollover Account (which is attributable to a "Participant's Rollover Account" (if any) under the Citizens Federal Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Citizens Federal Account. Your investment rights over these amounts are the same as your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw first from your Citizens Federal Participant's Account and your Citizens Federal Rollover Account, and then from your Citizens Federal Participant's Elective Account (excluding earnings). Hardship withdrawals will be paid in a lump sum.

State Savings Bank, Century Bank and State Savings Bank, F.S.B.

Special Accounts

Participants who participated in the State Savings Bank Profit Sharing Plan (the "State Savings Plan")

may have special Accounts maintained on their behalf known as the State Savings Account (attributable to a participant's "Account" under the State Savings Plan) consisting of one or more of the following subaccounts:

State Savings Employee Pre-Tax Contribution Account (which is attributable to a participant's "Employee Pre-Tax Contribution Account" under the State Savings Plan)

State Savings Employer Nonelective Contribution Account (which is attributable to a participant's "Employer Nonelective Contribution Account" under the State Savings Plan)

State Savings Matching Contribution Account (which is attributable to a participant's "Employer Matching Contribution Account" under the State Savings Plan)

State Savings Rollover Contribution Account (which is attributable to a participant's "Rollover Contribution Account" (if any) under the State Savings Plan)

State Savings Plan Employee After-Tax Contribution Account (which is attributable to participant's "Employee After-Tax Contribution Account" (if any) under the State Savings Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire State Savings Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your State Savings Employee Pre-Tax Contribution Account (excluding earnings) and your State Savings Rollover Account. Any hardship withdrawal will be paid in a single sum.

A participant shall have the right to withdraw, at any time, all or a portion of his State Savings Rollover Contribution Account or his State Savings Employee After-Tax Contribution Account.

A participant who has not terminated employment shall have the right to make withdrawals from his State Savings Account if he has reached age 59-1/2.

Enterprise Federal Savings Bank

Participants who participated in the Enterprise Federal Bancorp, Inc. Employee Stock Ownership Plan (the "Enterprise ESOP") may have special Accounts maintained on their behalf known as the Enterprise ESOP Account which is attributable to their "Company Stock Account" under the Enterprise ESOP. Your rights to your Enterprise ESOP Account are fully vested at all times.

Unless you direct otherwise, your Enterprise ESOP Account shall be invested solely in shares of common stock of Fifth Third Bancorp. The plan administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp stock as part of the Fifth Third Stock Fund, described above, or any other recordkeeping methodology the plan administrator deems appropriate. You have investment rights over your Enterprise ESOP Account. The Fifth Third Stock Fund shall be one of the available investment funds. Your investment rights over your Enterprise ESOP Account are the same as your investment rights over your other Accounts (described above under Account Investments).

To the extent your Enterprise ESOP Account is invested in Fifth Third Bancorp common stock or in the Fifth Third Stock Fund, you are entitled to vote the shares (or the shares represented by your interest in the Fund).

In accordance with rules prescribed by the plan administrator, when you are entitled to a withdrawal or distribution of your Enterprise ESOP Account, you may elect to receive, as part of the withdrawal or distribution, a number of whole shares represented by your interest in common shares of Fifth Third Bancorp or in the Fifth Third Stock Fund.

Participants whose Enterprise ESOP Account is invested in Fifth Third Bancorp common stock may elect to leave dividends payable on the stock in the Plan for reinvestment in Fifth Third common stock or to take dividends in cash. The plan administrator establishes the rules for making this election.

CNB Bancshares, Inc. and Subsidiaries

Special Accounts

Participants who participated in the Citizens Incentive Savings Plan (the "CISP") may have special Accounts maintained on their behalf known as the CISP Account consisting of one or more of the following subaccounts:

CISP Matching Contribution Account (which is attributable to the participant's "Employer Matching Contribution Account" under the CISP)

CISP Discretionary Contribution Account (which is attributable to the participant's "Employer Discretionary Contribution Account" under the CISP)

CISP Merger Account (which is attributable to the participant's "Merger Account" (if any) under the CISP)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your CISP Matching Contribution Account, CISP Discretionary Contribution Account, and CISP Merger Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you are described below and you have not terminated employment you have the right to make withdrawals (as indicated below) from your Section 401(k) Salary Deferral Account if you have reached age 59-1/2.

First Corporation Participant. A participant in the "First Corporation Savings Plan" on or prior to December 31, 1993 may make age 59-1/2 withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the First Corporation Savings Plan prior to January 1, 1994. No more than two such withdrawals may be made pursuant during a plan year.

Bank of Orleans Participant. A participant in the "Bank of Orleans Retirement Savings Plan" on or prior to December 31, 1995 may make age 59-1/2 withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the Bank of Orleans Retirement Savings Plan prior to December 31, 1995. No more than one such withdrawal may be made during a plan year.

Ottawa Financial Corporation and Subsidiaries

Participants who participated in the Ottawa Financial Corporation Employee Stock Ownership Plan (the "Ottawa ESOP") may have a special Account maintained on their behalf known as the Ottawa ESOP Participant Account (which is attributable to the participant's "Employee Stock Ownership Account" under the Ottawa ESOP).

Your rights to your Ottawa ESOP Participant Account are fully vested at all times.

Unless you direct otherwise, your Ottawa ESOP Participant Account will be invested solely in shares of common stock of Fifth Third Bancorp. The plan administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp stock as part of the Fifth Third Stock Fund, described above, or any other recordkeeping methodology the plan administrator deems appropriate. You have investment rights over your Ottawa ESOP Participant Account. The Fifth Third Stock Fund shall be one of the available investment options. Your investment rights over your Ottawa ESOP Participant Account are the same as your investment rights over your other Accounts (described above under Account Investments).

Participants whose Ottawa ESOP Participant Account is invested in Fifth Third Bancorp common stock may elect to leave dividends payable on the stock in the Plan for reinvestment in Fifth Third common stock or to take the dividends in cash. The plan administrator establishes the rules for making this election.

To the extent your Ottawa ESOP Participant Account is invested in shares of Fifth Third Bancorp common stock or in the Fifth Third Stock Fund, you are entitled to vote the shares (or the shares represented by your interest in the Fund).

In accordance with rules prescribed by the plan administrator, when you are entitled to a distribution of your Ottawa ESOP Participant Account, to the extent invested in shares of common stock of Fifth Third Bancorp, including if that investment is

represented by an interest in the Fifth Third Stock Fund, you may elect to receive, as part of that distribution, a number of whole shares of Fifth Third Bancorp common stock.

Old Kent Financial Corporation and Subsidiaries

Special Accounts

Participants who participated in the Old Kent Thrift Plan (the "Old Kent Plan") may have special Accounts maintained on their behalf known as the Old Kent Account consisting of one or more of the following subaccounts:

Old Kent Thrift Plus Account (which is attributable to a participant's "Thrift Plus Account" under the Old Kent Plan)

Old Kent Regular Account (which is attributable to a participant's "Regular Account" under the Old Kent Plan)

Old Kent Matching Account (which is attributable to a participant's "Matching Account" under the Old Kent Thrift Plan)

Old Kent Rollover/Transfer Account (which is attributable to a participant's "Rollover/Transfer Account" under the Old Kent Plan)

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Old Kent Account. Your investment rights over these amounts are the same as your investment rights

over your other Accounts (described above under Account Investments).

Vesting

Your rights to your Old Kent Thrift Plus Account, Old Kent Regular Account and Old Kent Rollover/Transfer Account shall be nonforfeitable at all times. You shall have a nonforfeitable right to a percentage of your Old Kent Matching Account pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 5	0%
5 or more	100%

Upon attaining age 55, and if you are employed by Fifth Third or an affiliate, you have a nonforfeitable right to your Old Kent Matching Account. Additionally, if your employment terminates because of your death or disability, your Old Kent Matching Account will be fully vested. The forfeiture rules described above under Vesting generally apply to your Old Kent Matching Account.

Your rights to any net earnings credited to your Old Kent Matching Account are nonforfeitable at all times.

Service

For purposes of vesting of a participant's Old Kent Matching Account, service under the Old Kent Thrift Plan will be treated as service under this Plan based on the Old Kent Thrift Plan's hour counting method through the period ending December 31, 2001. Service shall be credited using this Plan's elapsed time method beginning January 1, 2002. (See the section above on

Vesting Years.) For purposes of determining a participant's eligibility, a participant's past service with Old Kent Financial Corporation (or any subsidiary of Old Kent Financial Corporation) will be taken into account under the elapsed time method of this Plan.

In-Service Withdrawals

(1) No Hardship Withdrawals. In no event shall the hardship withdrawal provisions (described above under Hardship Withdrawals) apply to any part of a participant's Old Kent Account.

(2) Old Kent Matching and Regular Account Total Withdrawal. A participant who has not terminated employment may withdraw the total (and not less than the total) value of the nonforfeitable portion of his Old Kent Matching Account and Old Kent Regular Account. No amount held in the participant's Old Kent Matching Account less than two years shall be distributed unless the participant has been a participant for at least 60 months or has credit for at least 5 vesting years. A participant who elects a total withdrawal hereunder shall forfeit the forfeitable portion of his Old Kent Matching Account. If there is a forfeiture, the participant shall be entitled to a restoration of the forfeited amount upon repayment of the entire amount as provided by the Plan.

(3) Old Kent Regular Account Withdrawal. A participant who has not terminated employment may withdraw all or a portion

from his Old Kent Regular Account in accordance with rules prescribed by the plan administrator.

(4) Withdrawals from Old Kent Thrift Plus Account After Age 59-1/2. A participant who has not terminated employment may withdraw all or a portion from his Old Kent Thrift Plus Account if he has reached age 59-1/2. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Old Kent Thrift Plus Account, or (b) $100.

(5) Old Kent Rollover/Transfer Account Withdrawal. A participant who has not terminated employment may withdraw the total (and not less than the total) value of his Old Kent Rollover/Transfer Account.

The withdrawal rights under (2), (3) and (4) above (but not (5) above) are subject to the following. A withdrawal under (4) above of the participant's Old Kent Thrift Plus Account may be made at the same time as a withdrawal under (2) or (3) above but otherwise only one of the withdrawals described in (2), (3) and (4) above may be requested at any time. Only one withdrawal under (2), (3) and/or (4) above may be requested in a calendar quarter.

Loans

Any outstanding loans as of the merger of the Old Kent Plan will continue to be administered in accordance with the terms of the Old Kent Plan. A participant may borrow first from his Old Kent Thrift Plus Account and then from his Old Kent Rollover/Transfer Account.

Loans shall be subject to the limitations described above under the section entitled Loans except as follows: a participant may have up to two loans outstanding from his Old Kent Account but a new loan will not be made while any other loans are outstanding.

Distribution of Employer Stock

To the extent the portion of a participant's Old Kent Account is invested in the Fifth Third Stock Fund, the participant may elect, in accordance with rules and procedures established by the plan administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his Old Kent Account (including an in-service withdrawal).

First National Bankshares of Florida, Inc. Salary Savings Plan

Special Accounts

Participants who participated in the First National Bankshares of Florida, Inc. Salary Savings Plan (the "FNB Plan") may have special Accounts maintained on their behalf know as the FNB Account consisting of one or more of the following additional subaccounts:

FNB 401(k) Account (which is attributable to a participant's "Elective Deferral Contributions" under the FNB Plan)

FNB Qualified Matching Account (which is attributable to "Qualified Matching Contributions" ("Matching Contributions" made on or after January 1, 2004) under the FNB Plan)

FNB Pre-2004 Matching Account (which is attributable to "Matching Contributions" made before January 1, 2004 under the FNB Plan)

FNB Additional Contribution Account (which is attributable to "Additional Contributions" under the FNB Plan other than such amounts credited to the FNB Pre-Spin-Off Additional Contribution Account)

FNB Pre-Spin-Off Additional Contribution Account (which is attributable to "Additional Contributions" under the FNB Plan, which immediately after the spin-off of First National Bankshares of Florida, Inc. by F.N.B. Corporation, was invested in F.N.B. Corporation stock)

FNB Rollover Account (which is attributable to a participant's "Rollover Contributions" under the FNB Plan)

Vesting

Your rights to your FNB 401(k) Account, FNB Qualified Matching Account and FNB Rollover Account, if any, shall be nonforfeitable at all times.

You shall have a nonforfeitable right to a percentage of your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account, and your FNB Additional Contribution Account, if any, based on the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 1	0%
1	20%
2	40%
3	60%
4	80%
5 or more	100%

Upon attaining age 62, if you are employed by Fifth Third or an affiliate, you have a nonforfeitable right to your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account, and FNB Additional Contribution Account, if any. Additionally, if your employment terminates because of your death or disability, your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account and FNB Additional Contribution Account, if any, will be fully vested.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire FNB Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments). In addition to the investment funds available under the Plan generally, the F.N.B. Corporation Stock Investment Option is temporarily available as described below.

F.N.B. Corporation Stock Investment Option. The F.N.B. Corporation Stock Investment Option consists of stock of F.N.B. Corporation or a fund invested primarily in such shares. No new investments (through

investment transfers or contributions) can be made into this investment option. In accordance with rules prescribed by the plan administrator, you may elect to transfer part or all of your FNB Account out of this investment option and into other available investment options. However, such amounts may not be transferred back into this investment option. To the extent your FNB Account is invested under the F.N.B. Corporation Stock Investment Option, you are entitled to vote the shares (or the shares represented by your interest in any such fund).

> ***Important: Effective on a date determined by the plan administrator, the F.N.B. Corporation Stock Investment Option will be eliminated. Any FNB Accounts allocated to that investment option will be re-allocated to another investment option at that time.***

In-Service Withdrawals

Hardship Withdrawals. If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw first from your FNB Rollover Account and then from your FNB 401(k) Account (excluding earnings).

In-Service Withdrawals After Age 59½. If you have not terminated employment, you may make withdrawals from your FNB Account if you have reached age 59½. In-service withdrawals will be paid in a lump sum.

Loans

Any loans outstanding when the FNB Plan merged will continue to be administered in accordance with the terms of the FNB Plan. A participant may borrow from

his FNB 401(k) Account and his FNB Rollover Account. Loans will be subject to the limitations described above under the section entitled Loans except as follows: A participant may have up to two loans outstanding from his FNB Account and up to one loan outstanding from other available subaccounts under the Plan. However, a new loan will not be made while any other loans are outstanding.

Distribution of F.N.B. Corporation Stock

To the extent the portion of a participant's FNB Account is invested in common stock of F.N.B. Corporation (or a fund consisting primarily of the common stock of F.N.B. Corporation), the participant may elect, in accordance with rules and procedures established by the plan administrator, to have shares of F.N.B. Corporation stock distributed to him in any distributions of his FNB Account.

Card Management Corporation

Special rules apply in 2006 only to participants who were employed by Card Management Corporation immediately prior to its acquisition by Fifth Third on January 19, 2006 and who continued as employees after the acquisition. These participants are referred to here as "CMC Employees." Certain of these special rules also apply in 2006 only to employees hired by Card Management Corporation after January 19, 2006 (referred to here as "New Hires").

CMC Employees became eligible to make 401(k) deferrals, voluntary after-tax contributions and to receive employer matching contributions all as described in this Summary, commencing with the

February 17, 2006 pay date. New Hires are eligible under the normal eligibility rules described above.

For a period of time in 2006, CMC Employees and New Hires continued to be paid through the CMC payroll system rather than being integrated into the Fifth Third payroll system. Once a CMC Employee or New Hire began being paid through the Fifth Third payroll system, 401(k) deferrals, matching contributions and voluntary (after tax) contributions started being based on the types of compensation described above for this purpose (see the section on 401(k) Deferrals). Before that time, those contributions were based on total compensation reportable on IRS Form W-2 (using total compensation ***before*** being reduced for 401(k) contributions and contributions under a section 125 plan).

As described above (under the heading Performance Reward Contributions), Performance Reward Contributions are based on a percentage of your "annual compensation" (as defined under the heading Meaning of Compensation). For a CMC Employee, "annual compensation" for this purpose shall also include amounts paid in 2006 by CMC before the January 19th acquisition by Fifth Third. In addition, the definition of compensation specified above (under the heading Meaning of Compensation) shall apply only after a CMC Employee or a New Hire is paid through the Fifth Third payroll system. Prior to that time, total compensation shall be taken into account. Total compensation is the amount reportable on IRS Form W-2 (***before*** being reduced for 401(k) contributions and contributions under a section 125 plan), subject to the dollar limit specified above.

WHERE YOU CAN FIND MORE INFORMATION ABOUT FIFTH THIRD BANCORP

In this section and the section that follows, the terms "we" and "us" refer to The Fifth Third Bancorp.

We file annual, quarterly and current reports, proxy statements and other information with the SEC. Our SEC filings are available to the public over the Internet at the SEC web site at http://www.sec.gov or at our website at www.53.com. Except for documents specifically incorporated by reference into this booklet, information on our website is not part of this booklet. You may also read and copy any document we file with the SEC at its public reference room at 100 F Street, N.E., Washington, D.C. 20549. Please call the SEC at 1-800-SEC-0330 for further information on the operation of the public reference room.

The SEC allows us to "incorporate by reference" into this booklet the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this booklet, and information that we subsequently file with the SEC will automatically update and supersede information in this booklet and in our other filings with the SEC. In other words, in case of a conflict or inconsistency between information contained in this booklet and information incorporated by reference into this booklet, you should rely on the information that was filed later.

We incorporate by reference the documents listed below, which we have already filed with the SEC, and any documents we file with the SEC in the future

under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934 (other than information in such future filings deemed not to have been filed), until we sell all the securities offered by this booklet:

- Annual Report on Form 10-K for the year ended December 31, 2006, as amended;
- Quarterly Reports on Form 10-Q for the quarters ended March 31, 2007 and June 30, 2007;
- Current Reports on Form 8-K filed on January 16, 2007, January 22, 2007, March 30, 2007, May 10, 2007, May 21, 2007, as amended, July 27, 2007, July 30, 2007, August 7, 2007 and August 8, 2007; and
- The description of our common stock contained in a registration statement filed under the Securities Exchange Act of 1934, including any amendment or report filed for the purpose of updating such description.

We will provide you with a copy of any of these documents we are incorporating by reference, at no cost, by writing or telephoning us at the address or telephone number provided below. Also available without charge, upon written or oral request, are the documents required to be delivered to employees under Rule 428(b) promulgated under the Securities Act of 1933. Exhibits to our filings will not be sent unless those exhibits have been specifically incorporated by reference into this booklet. Requests should be made to:

Paul L. Reynolds
Executive Vice President, General Counsel
and Secretary
Fifth Third Bancorp Fifth Third Center
38 Fountain Square Plaza MD10AT76
Cincinnati, OH 45263 (513) 579-5300

CAUTIONARY STATEMENT REGARDING FORWARD-LOOKING STATEMENTS

This booklet contains and incorporates statements that we believe are "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933 and Rule 175 promulgated thereunder, and Section 21E of the Securities Exchange Act of 1934 and Rule 3b-6 promulgated thereunder. These statements relate to our financial condition, results of operations, plans, objectives, future performance or business. They usually can be identified by the use of forward-looking language such as "will likely result," "may," "are expected to," "is anticipated," "estimate," "forecast," "projected," "intends to," or may include other similar words or phrases such as "believes," "plans," "trend," "objective," "continue," "remain," or similar expressions, or future or conditional verbs such as "will," "would," "should," "could," "might," "can," or similar verbs. You should not place undue reliance on these statements, as they are subject to risks and uncertainties, including but not limited to those described in this booklet or the documents incorporated by reference, including the risk factors set forth in our most recent Annual Report on Form 10-K. When considering these forward-looking statements, you should keep in mind these risks and uncertainties, as well as any cautionary statements we may make. Moreover, you should treat these

statements as speaking only as of the date they are made and based only on information then actually known to us.

There are a number of important factors that could cause future results to differ materially from historical performance and these forward-looking statements. Factors that might cause such a difference include, but are not limited to: (1) general economic conditions, either national or in the states in which Fifth Third, one or more acquired entities and/or the combined company do business, are less favorable than expected; (2) political developments, wars or other hostilities may disrupt or increase volatility in securities markets or other economic conditions; (3) changes in the interest rate environment reduce interest margins; (4) prepayment speeds, loan origination and sale volumes, charge-off's and loan loss provisions; (5) our ability to maintain required capital levels and adequate sources of funding and liquidity; (6) changes and trends in capital markets; (7) competitive pressures among depository institutions increase significantly; (8) effects of critical accounting policies and judgments; (9) changes in accounting policies or procedures as may be required by the Financial Accounting Standards Board or other regulatory agencies; (10) legislative or regulatory changes or actions, or significant litigation, adversely affect Fifth Third, one or more acquired entities and/or the combined company or the businesses in which Fifth Third, one or more acquired entities and/or the combined company are engaged; (11) ability to maintain favorable ratings from rating agencies; (12) fluctuation of Fifth Third's stock price; (13) ability to attract and retain key personnel; (14) ability to receive dividends from its subsidiaries; (15) potentially

dilutive effect of future acquisitions on current shareholders' ownership of Fifth Third; (16) effects of accounting or financial results of one or more acquired entity; (17) difficulties in combining the operations of acquired entities; (18) ability to secure confidential information through the use of computer systems and telecommunications network; and (19) the impact of reputational risk created by these developments on such matters as business generation and retention, funding and liquidity.

You should refer to our periodic and current reports filed with the Securities and Exchange Commission, or "SEC," for further information on other factors which could cause actual results to be significantly different from those expressed or implied by these forward-looking statements. See "Where You Can Find More Information" above.

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EXHIBIT B

Summary Plan Description

of

The Fifth Third Bancorp

Master Profit Sharing Plan

(as of October 1, 2008)

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INTRODUCTORY INFORMATION

This booklet is a summary plan description of The Fifth Third Bancorp Master Profit Sharing Plan (as of October 1, 2008). The predecessor to the Plan was originally established effective as of January 1, 1955.

This booklet is only a summary. The legal Plan documents contain many complex provisions. The legal documents will govern and control the operation of the Plan. In addition, the Plan is subject to the federal tax laws applicable to tax-qualified plans.

The Plan Name is The Fifth Third Bancorp Master Profit Sharing Plan.

Fifth Third Bank is the Plan Sponsor. Certain other subsidiaries of Fifth Third Bancorp are also participating employers under the Plan. The terms "employer," and "Fifth Third" as used in this summary refer to any Fifth Third Bancorp affiliate that is a participating employer under the Plan. A complete list of the employers sponsoring the Plan may be obtained upon written request to the plan administrator and is available for examination by participants and beneficiaries.

The Employer Identification Number (EIN) used for the plan sponsor is: 31-0854434.

The Plan Number assigned to the Plan by Fifth Third is 001.

The Plan is for the exclusive benefit of the participants, and its assets do not belong to Fifth Third.

The Plan Type is defined contribution with a Section 401(k) feature. Portions of the Plan constitute a stock bonus plan and an employee stock ownership plan.

Benefits under the Plan are nonassignable. This means that you may not pledge or otherwise transfer your right to receive benefits. There is a detailed exception for qualified domestic relations orders.

Benefits will be paid under this Plan only if the plan administrator decides in its discretion that the applicant is entitled to them.

The Plan is administered by The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee as the plan administrator:

Fifth Third Bank
38 Fountain Square Plaza
MD 10AT41
Cincinnati, Ohio 45263
Telephone Number: 513-579-6162

The Plan Trustee is:

Fifth Third Bank
38 Fountain Square Plaza
Cincinnati, Ohio 45263

The Agent for Service of Legal Process is:

Fifth Third Bank
38 Fountain Square Plaza
Cincinnati, Ohio 45263

The Plan Year is the 12-month period beginning on January 1 and ending on December 31.

For more information regarding the Plan please contact My HR Direct at 1-877-694-7347.

While we hope you find My HR Direct useful, please understand that they are not the "plan administrator" and cannot commit the Plan, the plan administrator or Fifth Third to anything that is not in the legal Plan documents or change the Plan in any way. If you have a claim for benefits or wish to appeal a denial of a claim, you must follow the procedures below under the heading "Claims." My HR Direct has no authority to decide claims or appeals and nothing they say should be construed as a denial of a claim.

PARTICIPATION

Eligibility Requirements

Performance Reward Contributions and Rollovers.

When you first become an employee, you are eligible immediately to potentially share in Performance Reward Contributions - - there is no waiting period or minimum age (but, as discussed below, you generally must be employed on the last day of the plan year to receive a Performance Reward Contribution). You are also eligible immediately to make a rollover from another tax-qualified plan. These types of contributions are discussed below.

401(k), Match and After-Tax Contributions.

After you have credit for 30 days of eligibility service, you will be eligible to begin making 401(k) deferrals, voluntary after-tax contributions and to receive

employer matching contributions. This eligibility will commence with the first pay date *following* your completion of 30 days of eligibility service. These types of contributions also are discussed below.

If you terminate service with the employer after completing 30 days of eligibility service and are later reemployed, you will be eligible to make 401(k) deferrals, voluntary after-tax contributions and to receive employer matching contributions on the date on which you again become an employee (provided you still have credit for 30 days of eligibility service).

Employee

In order to be eligible, you must be an employee of Fifth Third (including any affiliate which is a participating employer under the Plan). Independent contractors, leased employees, employees of temporary agencies, non-resident aliens and employees whose position is located primarily outside the United States are not eligible. Any individual that Fifth Third does not consider to be an employee for purposes of the Plan is not eligible even if the individual is considered to be an employee for other purposes such as employment tax purposes.

Eligibility Service

Your eligibility service begins when you start working for Fifth Third. In addition, your eligibility service includes the period of time you spend in certain military service if you return to work at the end of the service. Your eligibility service stops when you die, retire, quit, or are discharged, or after 12 months of absence for any other reason. However, if you return to work within 12 months after the beginning of any

absence, then the absence will be included in your eligibility service.

CONTRIBUTIONS AND ACCOUNTS

Accounts

A participant may have one or more of the following Accounts to reflect contributions currently available under the Plan:

- Section 401(k) Salary Deferral Account
- Age 50 Catch-Up Account
- Post-2003 Employer Matching Account
- Performance Reward Account
- After-Tax Account
- Rollover Account

A Participant may also have one or more of the following accounts to reflect contributions previously allowed under the Plan:

- Pre-2004 Employer Matching Account
- Profit Sharing Account
- Frozen Cash Election Account
- Frozen Vesting Account

Some participants may have additional Accounts that reflect funds merged into the Plan from certain predecessor plans. See the section entitled **Special Provisions for Certain Predecessor Plans and Affiliates.**

The amount of your benefit will depend on the value of your Accounts. Your Accounts are for bookkeeping purposes only, and you can receive money from the Plan only as provided by the Plan.

The different types of Accounts reflect the different types of contributions that are either allowed now or have been allowed in the past under the Plan.

401(k) Deferrals

After you have credit for 30 days of eligibility service, you may direct your employer to make contributions from your eligible compensation directly to the Plan, for allocation to your Section 401(k) Salary Deferral Account. Your eligible compensation is generally the same as that described below under the heading "Meaning of Compensation" but there are a few differences. Variable compensation is not eligible but 401(k) deferrals are taken from other performance-based additional cash compensation incentives. Federal and state income tax will not be withheld on these contributions, but they will be subject to Social Security tax and may be subject to local income tax. Subject to the limits imposed by law or the plan administrator, you may contribute any percent for any pay period out of your eligible compensation as either 401(k) or voluntary after-tax contributions.

No more than $230,000 (for the 2008 Plan Year, as adjusted for inflation and increases) prescribed by law) of compensation may be taken into account for 401(k) contributions. This means that if and when your eligible compensation reaches the $230,000 (as adjusted) limit, your 401(k) contributions, voluntary after-tax contributions and matching contributions will stop.

Federal law imposes an annual dollar limit on the amount of compensation you may defer. Under this limit, the amount you defer on a pre-tax basis may not

exceed $15,500 in 2008. That limit will be increased to adjust for inflation in future years. When you reach the adjusted $15,500 pre-tax limit, your 401(k) pre-tax deferrals automatically "flip" to after-tax contributions. The rate of after-tax contributions generally will be the same as the rate of your 401(k) pre-tax deferrals at the time of the "flip" except a "highly compensated employee's" rate will generally be limited to 4%. These after-tax contributions will be eligible for the company match. You may discontinue this after tax deduction at any time by logging on to Retire.53.com and changing your pre-tax contribution rate to 0%. You will no longer receive the company match if you discontinue these contributions.

Beginning with the plan year in which you attain age 50, you may make catch-up contributions to your Age 50 Catch-Up Account in excess of the normal 401(k) contribution limits or any of the limits that keep you from making regular 401(k) contributions. Catch-up contributions do not count toward these limits. Catch-up contributions are not eligible for the employer matching contributions described below (this includes catch-up contributions that are later recharacterized as regular 401(k) contributions). Federal law imposes annual limits on the amount of catch-up contributions you may make, and these limits may vary from year to year. The limit for 2008 is $5,000. See the plan administrator for the limits in effect for a particular year.

Section 401(k) deferrals under the Plan provide you with a tax-sheltered way to save for retirement. You do not pay federal or state income taxes on deferred amounts or investment gains until your Account is paid

to you from the Plan. Thus, you benefit in two ways. First, since deferred amounts are not subject to federal and state income tax, your current taxes are lower. Second, the deferred amounts can grow faster than if investment gains were taxed currently.

Your 401(k) deferral agreement remains in effect until you modify or terminate it. The plan administrator may prescribe rules governing the election, modification and termination procedures. In addition, in order to satisfy the complex regulations governing the Plan, the plan administrator may further limit your contributions or make distributions to you if it is determined that excess contributions were made.

The ability to make 401(k) deferrals may be restricted to those participants whose compensation is paid through the Fifth Third payroll system.

Voluntary (After-Tax) Participant Contributions

In addition to your ability to make 401(k) contributions, you may make voluntary (after-tax) contributions to the Plan after you have credit for 30 days of eligibility service. Your contributions would not be tax deductible. Even if you make contributions through payroll deduction, the amounts contributed will be subject to full taxation as if paid directly to you.

However, as the Plan is a tax-qualified plan, income taxes on any earnings would be deferred until you receive them.

Your voluntary contributions will be credited to your After-Tax Account.

The plan administrator may set limits on the amount of voluntary contributions you may make. Because of complex rules governing this type of contribution, you may not be able to contribute as much as you like and you may be required to take a distribution of any excess contribution.

Employer Matching Contributions

After you have credit for 30 days of eligibility service, your subsequent 401(k) contributions (excluding catch-up contributions) will qualify for an employer matching contribution to your Post-2003 Employer Matching Account. Fifth Third's matching contributions for a pay period will be based on your 401(k) deferrals (excluding catch-up contributions) up to 4% of your eligible compensation for a pay period. The match will equal 100% of the first 4% of your deferrals for a pay period.

Deferring more than 4% in a pay period will not increase the match.

Example Assume you have $1,000 in eligible compensation per pay period. If you elect to defer 4% ($40), this $40 contribution will be matched 100%. Thus, your match for the pay period will be $40 (100% of $40).

If you are otherwise eligible for the employer matching contribution but your Section 401(k) contributions have "flipped" to after-tax contributions because you reached the adjusted $15,500 limit described above, you will still qualify for subsequent pay period matches by allowing the contributions to continue as after-tax contributions. This is the only circumstance in which voluntary after-tax contributions will be matched.

Other elected voluntary after-tax contributions will not be matched.

As noted above, once your eligible compensation reaches the adjusted $230,000 limit, you will no longer be entitled to receive matching contributions for the year (or to make 401(k) contributions or after-tax contributions).

Performance Reward Contributions

You are eligible to have an allocation to your Performance Reward Account for a plan year if you fit any of the following descriptions:

(1) you were employed by Fifth Third on the last day of the plan year (December 31);

(2) you were on an approved leave of absence on the last day of the plan year and you received compensation from Fifth Third for the plan year; or

(3) your employment terminates during the plan year because of death, disability, or retirement (at or after age 55 and completion of 5 vesting years).

For each plan year, the board of directors of Fifth Third Bancorp determines the total amount (if any) to be contributed for allocation under the Plan as a Performance Reward Contribution. If you are eligible, your allocation will be expressed as a percentage of your annual compensation (defined below) for the plan year. That percentage is the same for all eligible participants.

Your allocation shall be credited to your Performance Reward Contribution Account.

Meaning of Compensation

For purposes of making Performance Reward Contribution allocations under the Plan, annual compensation generally means the remuneration (before reduction for withheld amounts) an employee receives from Fifth Third during a plan year, in the form of base wages or salary. The following amounts are also included:

- overtime
- variable compensation and similar compensation.

The following amounts are among those that are excluded:

- payments made pursuant to product-focused incentive plans
- tuition refund reimbursement
- Benefit Choice Dollars
- deferrals under the Nonqualified Deferred Compensation Plan
- similar payments and benefits

Performance-based additional cash compensation incentives (other than variable compensation) shall be excluded unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all employees or

all non-highly compensated employees covered by the incentive program.

Amounts otherwise meeting this definition that a participant would have received but for 401(k) contributions under the Plan, compensation reduction contributions under the Fifth Third Bank 125 Plan or pursuant to a Code Section 132(f)(4) qualified transportation arrangement are included.

No more than $230,000 (for the 2008 Plan Year, as adjusted for inflation and increases prescribed by law) of compensation may be taken into account for any participant for any plan year.

Profit Sharing Account

This Account reflects contributions of Profit Sharing allocations for plan years after 1996 and before 2004, if any, and any forfeitures allocated with such contributions.

Pre-2004 Employer Matching Account

This Account reflects the employer matching contributions for plan years before 2004.

Frozen Cash Election Account

This Account reflects contributions of the elective percentage of Profit Sharing allocations for plan years before 1997, if any.

Frozen Vesting Account

This Account reflects employer contributions for plan years before 1997 of that portion of each participant's Profit Sharing allocation which exceeded his Elective Percentage and forfeitures allocated thereto, if any.

Rollover Contributions

While employed by Fifth Third, you may contribute to the Plan a distribution you receive from an eligible retirement plan if the distribution qualifies as a rollover amount under the Internal Revenue Code. You may not rollover amounts attributable to deductible employee contributions, after-tax employee contributions or traditional Individual Retirement Account (IRA) contributions. Any rollover contribution shall be contributed to your Rollover Account.

VESTING

You will be entitled to benefits under the Plan only to the extent that you are vested. To have a vested right, or a nonforfeitable right, to part or all of an Account means that you have an unconditional right which is legally enforceable against the Plan. However, vesting does not guarantee the value of your Account against investment losses.

Fully Vested Accounts

Your rights to any of the following Accounts are fully vested at all times:

After-Tax Account

Rollover Account

Frozen Cash Election Account

Section 401(k) Salary Deferral Account

Age 50 Catch-Up Account

Profit Sharing Account (subject to the limited forfeiture for competition or dishonesty exception (see below)) and

Pre-2004 Employer Matching Account

Performance Reward Account

At Normal Retirement Age. You are fully vested in your Performance Reward Account if you are employed by Fifth Third at Normal Retirement Age. "Normal Retirement Age" means the date on which you both reach age 65 and have completed 5 vesting years or attained the fifth anniversary of the time you began participation in the Plan.

Before Normal Retirement Age, Death or Disability. Your rights to your Performance Reward Account shall become nonforfeitable according to the following vesting schedules, as applicable:

The amounts credited to your Performance Reward Account attributable to contributions for plan years before 2007 shall become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 5	0	100
5 or more	100	0

The amounts credited to your Performance Reward Account attributable to contributions for plan years 2007 and later shall become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Post-2003 Employer Matching Account

At Normal Retirement Age. You are fully vested in your Post-2003 Employer Matching Account if you are employed by Fifth Third at Normal Retirement Age.

Before Normal Retirement Age, Death or Disability. Your rights to your Post-2003 Employer Matching Account become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Frozen Vesting Account

At Normal Retirement Age. You are fully vested in your Frozen Vesting Account if you are employed by Fifth Third at Normal Retirement Age.

Before Normal Retirement Age, Death or Disability. Subject to the limited forfeiture for competition or dishonesty exception (see below), your rights to your Frozen Vesting Account become nonforfeitable according to the following schedule:

Vesting Years	Nonforfeitable Percentage	Forfeitable Percentage
Less than 3	0	100
3	30	70
4	40	60
5	60	40
6	80	20
7 or more	100	0

The forfeitable percentage is the amount you will lose if one of the events giving rise to a forfeiture (described below) occurs.

Vesting Years

A vesting year is 365 days of service (whether or not continuous). You get credit for service until you die, retire, quit, or are discharged, or until the end of 12 months of absence for any other reason. However, if you return to work within 12 months after the beginning of an absence, then the absence will be included in your service. Service with Fifth Third Bank and other affiliates of Fifth Third Bancorp (commencing with the date of affiliation) counts. Certain military service also counts as vesting service if you return to work at the end of the service.

In addition, Fifth Third employees who became employees as a result of an acquisition generally

receive credit for service under this Plan for service with their predecessor employer as listed below:

- ACI Merchant Services, Inc.
- Bank One, National Association
- Bank of Ashland, Inc.
- Capital Bank, N.A.
- Card Management Corporation
- CitFed Bancorp, Inc. and Subsidiaries
- Citizens Heritage Bank, National Association
- CNB Bancshares, Inc. and Subsidiaries
- Commercial National Bank
- Decatur County Bank
- Enterprise Federal Savings Bank
- First Horizon National Corporation (and First Tennessee Bank National Association)
- First Nationwide Bank
- Franklin Financial Corporation and Subsidiaries
- Gateway Leasing Corporation
- Great Lakes National Bank, Ohio, N.A.
- Heartland Capital Management, Inc.
- Integrated Delivery Technologies, Inc.
- Kentucky Enterprise Bank, FSB
- The Ohio Company
- Ottawa Financial Corporation (and Subsidiaries)
- Peoples Bank Corporation of Indianapolis (and Subsidiaries)
- Resource Management, Inc. (dba Maxus Investment Group)
- R-G Crown Bank, FSB
- South Florida Bank
- State Savings Company and Subsidiaries
- Strongsville Savings Bank
- USB, Inc.

- Vanguard Financial Company
- W. Lyman Case & Company

Additionally, service taken into account for vesting purposes under the following predecessor plans generally counts as vesting service under this Plan:

- Boone State Bank Profit Sharing Plan
- Falls Savings Bank, F.S.B., Salary Savings Plan
- Financial Institutions Thrift Plan (as adopted by the Cumberland Federal Savings Bank)
- First Charter Corporation Retirement Savings Plan
- The First-Mason Bank Employees' Profit Sharing Plan
- First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan
- First National Bankshares of Florida, Inc. Salary Savings Plan
- Mutual Federal Savings Bank Retirement Savings Plan
- NBD Bancorp, Inc. Employees' Savings and Investment Plan
- New Palestine Bank Employees' 401(k) Plan
- Old Kent Thrift Plan (See the section entitled Old Kent Financial Corporation and Subsidiaries under Special Provisions for Certain Predecessor Plans and Affiliates, below, for special rules.)
- W. Lyman Case & Company 401(k) Profit Sharing Plan

Specific rules for determining and counting service with predecessor employers and under predecessor plans are set forth in the Plan document and the plan administrator's application of the service counting provisions is binding and conclusive on all parties.

There shall be no duplication of service under the Plan for the same period of time.

Forfeiture Resulting From Break In Service

If you incur a break in service (see the section entitled Breaks in Service and Re-Employment), then you will forfeit, or lose, the forfeitable percentage of your Frozen Vesting Account, Performance Reward Account and Post-2003 Employer Matching Account.

Forfeiture Resulting From Cash-Out

Even if you do not incur a break in service, you can forfeit the forfeitable part of your Frozen Vesting Account, Performance Reward Account and Post-2003 Employer Matching Account if you have received a distribution of your entire vested interest. The forfeiture applies only if the distribution is $5,000 or less or you voluntarily elect to receive it. If you have no vested interest, then your non-vested interest will be immediately forfeited upon your termination of service. The forfeiture can be avoided if you again become covered by the Plan and repay the distribution (if any) to the Plan before the earlier of incurring a break in service or the fifth anniversary of your return to employment.

Forfeiture for Competition or Dishonesty

You will forfeit all of your Frozen Vesting Account and your Profit Sharing Account if the Executive Committee of your employer determines that you have either

(1) committed an act of dishonesty against or with respect to Fifth Third, any customer or other person with whom Fifth Third deals, or

(2) entered into competition with Fifth Third either directly or indirectly as an officer, employee, agent or consultant.

This forfeiture rule applies only if you have credit for less than 5 years of vesting service and your employment with Fifth Third terminates prior to Normal Retirement Age.

Death After Termination of Employment

If you die after the termination of your employment, then any forfeitable amount in your Account will be forfeited.

Allocation of Forfeitures

Forfeitures occurring during a plan year are first applied to the restoration of previous forfeitures under the cash-out rules described above and then are applied to the reduction of the employer's contributions (either Matching Contributions or Performance Reward Contributions, as determined by the employer).

ACCOUNT INVESTMENTS

In General

The plan assets are held in trust, and you may direct the investment of all of your Accounts from among the investment choices available under the Plan. The plan administrator directs the Trustee as to which investment funds to make available, including the Fifth Third Stock Fund. The plan administrator

establishes the procedures for making and changing investment elections.

Employer matching contributions will be made initially into the Fifth Third Stock Fund. Although you may not direct that the matching contributions be made to any of the other investment funds, after a matching contribution is credited to your Post-2003 Employer Matching Account, you may direct that such amounts be moved from the Fifth Third Stock Fund to other investment choices available under the Plan.

Under current procedures, statements of Account are provided to participants quarterly and, in addition, a participant can access Account information any time at Retire.53.com.

The Fifth Third Stock Fund and Dividend Pass-Through

The Fifth Third Stock Fund is invested primarily in shares of common stock of Fifth Third Bancorp. The fund may also be invested in short-term liquid investments. Participants whose Accounts are invested in the Fifth Third Stock Fund shall be entitled to vote the shares represented by such interests in the fund. Participants whose Accounts are invested in the Fifth Third Stock Fund may elect to leave dividends payable on the Fifth Third common stock in the Plan for reinvestment in Fifth Third common stock or to take the dividends in cash. The plan administrator establishes the rules for making this election.

Trust Income

Your Accounts are periodically adjusted to take account of the trust's income and any losses, as well as

increases or decreases in value of the trust's assets. These adjustments are made on the basis of the size of your Accounts in the particular investment option in proportion to the total value of all Accounts therein.

Plan Expenses

Expenses allocable to your Accounts will be deducted from your Accounts. This could include, for example, fees for plan loans, withdrawals, distributions, or qualified domestic relations orders.

Plan Loans

You may make a written application to the plan administrator for a loan from the Plan from your Section 401(k) Salary Deferral Account, Age 50 Catch-Up Account, Frozen Cash Election Account, Rollover Account (or a predecessor plan account attributable to 401(k) deferrals or rollover contributions).

You must use 50% of your vested Account as security for the loan. A loan is treated as an investment in your Account. Interest payments and principal repayments go back into your Account. Any outstanding loans are due and payable upon your termination of employment.

You will have to pay any administrative costs in connection with the loan. You will have to pay a reasonable rate of interest and agree to repay the loan within no more than 5 years through payroll withholding with equal or roughly equal payments.

Loan Conditions

There are a number of conditions applicable to plan loans.

(1) All loans are repaid through payroll deduction.

(2) The minimum amount for any single loan is $1,000.

(3) You may have no more than one loan outstanding at any given time.

(4) The amount available to be loaned is limited to the least of:

a. $50,000, reduced by the excess, if any, of your highest outstanding balance of loans from the Plan during the 1-year period prior to the date of the loan over your current outstanding balance of loans; or

b. one-half (½) of the value of your vested Account balance; or

c. the balance of your Section 401(k) Salary Deferral Account, Age 50 Catch-Up Account, Frozen Cash Election Account and Rollover Account (and any predecessor plan account attributable to 401(k) deferrals or rollover contributions).

The interest you pay on your plan loan may not be tax deductible. There are general tax law limitations on the deductibility of interest as well as specific limitations on loans from qualified retirement plans. If you are interested in a tax deduction, you should consult a tax advisor familiar with the Plan for assistance.

HARDSHIP WITHDRAWALS

In accordance with rules prescribed by the plan administrator, you may withdraw amounts first from your Rollover Account and then from your Section 401(k) Salary Deferral Account and Age 50 Catch-Up Account in the event of hardship, except to the extent you have secured a plan loan with these Accounts. The total of such withdrawals from your Section 401(k) Salary Deferral Account and Age 50 Catch-Up Account may not exceed the total amount of your 401(k) contributions. Earnings may not be withdrawn and no part of any employer contributions may be withdrawn. A hardship withdrawal is allowed only if the withdrawal is necessary to satisfy an immediate and heavy financial need due to one of the following:

- to pay for needed or previously incurred medical expenses for you, your spouse or your dependents;
- the purchase of your primary residence (mortgage payments are excluded);
- to pay tuition and related educational fees for the next 12 months of post-secondary education for you, your spouse or your dependents;
- to avoid foreclosure on, or eviction from, your principal residence;
- payments for burial or funeral expenses for your deceased parent, spouse, children or dependents; or
- expenses for the repair of damage to your principal residence that would qualify for the

casualty deduction under Federal tax law (determined without regard to whether the loss exceeds 10% of adjusted gross income)

Documentation of the applicable circumstance will be required. The amount of the withdrawal may not exceed the amount required to satisfy the specific need.

The hardship withdrawal is considered necessary only if the plan administrator (or its delegate) determines in its sole and absolute discretion that, based on your representations (unless the plan administrator has actual knowledge to the contrary), the need cannot be relieved by any of the following:

- reimbursement or compensation by insurance, or otherwise;
- reasonable liquidation of your assets and the assets of your spouse and minor children (except for such assets which are held under an irrevocable trust or under the Uniform Gifts to Minors Act) to the extent such liquidation itself would not cause an immediate and heavy financial need;
- discontinuance of 401(k) contributions and voluntary (after-tax) participant contributions;
- any available distributions, loans or dividend pass-through elections from all plans maintained by the employer or by another employer; or
- loans from banks or other commercial lenders.

Any hardship withdrawal which is granted shall be paid as soon as administratively feasible after the

trustee's receipt of notice of the withdrawal. A request for withdrawal can be made only once per plan year quarter.

WITHDRAWAL OF VOLUNTARY (AFTER-TAX) PARTICIPANT CONTRIBUTIONS

In accordance with rules prescribed by the plan administrator, you may withdraw amounts from your After-Tax Account without proof of hardship. Any withdrawal shall be paid as soon as administratively feasible after the trustee's receipt of notice of the withdrawal. A request for withdrawal can be made only once per plan year quarter.

You should consult your tax advisor regarding the tax treatment of any withdrawals from the Plan.

RETIREMENT BENEFITS

The Plan is for your retirement. Although you may withdraw your Rollover Account and 401(k) contributions in the event of hardship and otherwise withdraw from your After-Tax Account, your benefits generally do not start until after you retire or otherwise terminate your employment with Fifth Third.

Amount

The amount of your benefit will depend on the cash value of the vested part of your Accounts as determined by the plan administrator under the Plan's valuation procedures. If your employment terminates, then your Accounts will generally be available to you as soon as administratively feasible.

When Your Benefit Starts

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) exceed $5,000, then, upon your termination of employment, you generally have the right to commence your distribution as soon as administratively feasible following your termination of employment.

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding roll overs) exceed $5,000, then you have the right to defer the commencement date of your distribution. Nevertheless, the distribution of your Accounts must begin by April 1 of the calendar year following the later of the calendar year in which you attain age 70-1/2 or the calendar year in which you retire. If you have not already elected to start benefit payments, they will commence automatically as of that date.

The plan administrator has the right to delay your distribution (or a distribution on your death) for up to 12 months in order to investigate whether the provision for forfeiture for dishonesty or competition is applicable in your case (see the section on Forfeiture for Competition or Dishonesty).

Cash-Out Distributions

Once your Accounts become distributable (on account of termination of employment), if your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) are $5,000 or less, then your Accounts (including your Rollover Account and any other subaccount from a

merged plan holding rollovers) will be distributed automatically in a single sum as soon as administratively feasible. However, you will be given 30 days to elect either a payment to you or a direct rollover if your vested Account is at least $200. Also, if your Accounts are invested in the Fifth Third Stock Fund, during an election period prescribed by the plan administrator, you may elect to have whole shares of Fifth Third Bancorp stock distributed to you, with the remainder of the distribution in cash.

If you do not make a valid election within the applicable election period, your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) will be paid automatically as follows:

- if your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) does not exceed $1,000, then it will be paid in cash subject to applicable withholding.

- if your vested Account (including any Rollover Account and any other subaccount from a merged plan holding rollovers) exceeds $1,000, then it will be distributed in an automatic rollover to an individual retirement account ("IRA") with Fifth Third Bank.

The assets in the IRA shall initially be invested in a Fifth Third Bank investment fund which is designed to preserve principal and provide a reasonable rate of return and liquidity (such as an interest-bearing account, a certificate of deposit or a money market fund). Note that the IRA's initial investment may be

Fifth Third Bank's own proprietary investment product. Fifth Third Bank will charge your IRA for annual maintenance fees. You can transfer the assets in this IRA to another IRA at any time and without cost.

You may contact the plan administrator if you have questions regarding the Plan's automatic rollover provisions or Fifth Third Bank IRAs, including IRA investment options, fees and expenses.

Forms of Payment

If your vested Accounts (excluding the value of your Rollover Account and any other subaccount from a merged plan holding rollovers) exceed $5,000, then you may elect payment in one of the following forms:

- a single sum; or
- periodic installment payments, with any amounts remaining unpaid at your death to be paid to your beneficiary

If you elect a single sum distribution and if, pursuant to your investment election, you have Accounts invested in the Fifth Third Stock Fund, you may elect to have whole shares of Fifth Third Bancorp stock distributed to you, with the remainder of the distribution in cash. Such an election must be in accordance with the rules and procedures of the plan administrator. In the absence of a valid election, your payment would be in cash.

DIRECT ROLLOVER

To the extent a payment you would receive under the form of payment you select qualifies as an "eligible

rollover distribution" you may have the right to direct that the payment be made directly to your IRA (individual retirement account or annuity), an annuity plan described in 403(a) of the Code, an annuity contract described in Section 403(b) of the Code, an eligible plan sponsored by a state or local government employer, or another employer's qualified retirement plan. A payment which qualifies as an "eligible rollover distribution" but which you decide to take instead of having transferred typically will be subject to mandatory 20% federal income tax withholding. Most single sum payments and installment payments over a period of less than 10 years will qualify as "eligible rollover distributions."

The direct rollover may be accomplished by providing you with a check made payable to the eligible retirement plan for you to provide to the eligible retirement plan.

Hardship withdrawals cannot qualify as eligible rollover distributions. There are a number of other exceptions and special rules. For further information, see the plan administrator.

DEATH BENEFITS

If you die before the commencement of your benefit payments, then the Plan provides death benefits equal to the value of your vested Account balances. If you die while employed by Fifth Third, and if you are not already fully vested, then you will become fully vested.

The death benefit will be paid to your beneficiary. You may designate a beneficiary by filing a form with the plan administrator. If you designate someone other

than your spouse as your beneficiary, then your spouse must give notarized consent.

DISABILITY

If your service terminates during a plan year due to a disability, you will still be entitled to a Performance Reward allocation for that plan year. Also, if, while working for Fifth Third, you become disabled, and if you are not already fully vested, then you will become fully vested.

For this purpose, disability means an incapacity caused by bodily injury or disease which prevents an employee from performing his regular duties, based upon medical evidence satisfactory to the plan administrator. The plan administrator has the sole, absolute and uncontrolled discretion to determine whether or not a disability exists in a particular case.

QUALIFIED DOMESTIC RELATIONS ORDERS

A participant's Account may be assigned in whole or in part to his or her spouse (or certain other qualified "alternate payees") pursuant to a divorce or dissolution. In order for an attempted assignment to be valid, the order making the assignment must constitute a "qualified domestic relations order." The requirements of a qualified domestic relations order are quite complex. To assist participants (and their attorneys) who are contemplating a division of Plan benefits pursuant to a divorce or dissolution, the plan administrator has developed a Model Qualified Domestic Relations Order. To obtain a copy of the Model and other pertinent information contact the plan administrator. Plan participants and beneficiaries can obtain, without charge, a copy of the Plan's procedures

governing determination of qualified domestic relations order procedures from the plan administrator.

The Plan allows a qualified domestic relations order to require an immediate single sum distribution of the amount assigned to the participant's spouse or other alternate payee. If an order so provides, the single sum will be paid as soon as administratively feasible after the plan administrator determines its qualified status (even if the participant remains employed). If an order specifies any other form or time of distribution, it cannot commence until the participant's benefit would begin under the Plan or as required by law.

Reasonable expenses attendant to the determination and administration of a qualified domestic relations order will be charged to the affected participant's Account. It is acceptable for the qualified domestic relations order to require the alternate payee to share in a specified portion of such expenses. It is expected that the expenses incurred will be lower if the parties and their attorneys use the Model as the basis for drafting a qualified domestic relations order and if care is taken in tailoring the Model to the participant's circumstances. Incorrect cross-references, impermissible directions, ambiguous provisions and the like will increase the expenses charged to the participant's Account.

BREAKS IN SERVICE AND RE-EMPLOYMENT

A break in service is a period of severance of employment of at least 72 consecutive months; however, you are not charged with a break for certain approved leaves of absence or certain military service if you return to work at the end of the leave or service.

One consequence of incurring a break in service is that if you are re-employed, your prior service may no longer count. This would occur only if:

- you were not vested in any part of your Account attributable to employer contributions and
- if the break was at least as long as your prior service.

If you are re-employed after a break and your prior service is disregarded, then you will be treated as a new employee.

SUSPENSION OF BENEFITS ON RE-EMPLOYMENT

If you are re-employed after becoming entitled to a benefit, then your benefit may be suspended.

SUMMARY OF CIRCUMSTANCES WHICH MAY CAUSE LOSS OF BENEFITS

The following is a summary of some of the circumstances, described in the preceding pages, that may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of benefits:

(1) If you incur a break in service, you will forfeit the forfeitable portion of your Account. In addition, if you are later re-employed, your prior service may not count.

(2) If you are not employed by Fifth Third at the end of the year, you will not receive a Performance Reward allocation unless, during the year you died, became disabled,

retired (after age 55 and completion of 5 vesting years), or were on an employer approved leave of absence.

(3) The amount that may be contributed by or for you may be limited because of tax rules.

(4) If you receive your entire vested interest before a break in service, you may forfeit the forfeitable percentage of your Account.

(5) If you die after the termination of your employment, you may forfeit the forfeitable percentage of your Account.

(6) You may forfeit your Frozen Vesting Account, your Pre-2004 and Post-2003 Employer Matching Account, and your Profit Sharing Account because of dishonesty or competition with Fifth Third.

TOP HEAVY PLANS

Federal law requires the Plan to contain certain rules that would apply if the Plan were to become "top heavy." The Plan is not currently top heavy and although it is highly unlikely that it will ever become top heavy, the Plan must say what would happen if it were to become top heavy. The rules are very complex, but plans are generally top heavy if more that 60 percent of the Account balances belongs to certain key employees.

If the Plan were top heavy, certain minimum contributions would be required (the amount typically contributed in recent years far exceeds the minimum amount that would be required). In addition, vesting in

your Frozen Vesting Account would be over a two-to-six year period and vesting in your Performance Reward Account would be 100 percent after 3 vesting years (and zero before). The employer will let you know if the Plan is top heavy.

PLAN AMENDMENT AND TERMINATION

Fifth Third expects the Plan to be permanent but Fifth Third Bank, by action of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has the right to terminate the Plan at any time on behalf of all of the Fifth Third Bancorp Affiliates. If the Plan should happen to terminate while you are still employed, you would automatically become vested in any forfeitable part of your Accounts.

The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee or the Chairman of such Committee may amend the Plan at any time on behalf of all of the Fifth Third Bancorp Affiliates.

The Employee Retirement Income Security Act of 1974 (ERISA) established the Pension Benefit Guaranty Corporation to guarantee the benefits under the certain plans. This Plan is not covered by that program. You will receive the full value of your vested interest as of the appropriate valuation date.

CLAIMS

Making a Claim

The plan administrator has the power and authority in its sole, absolute and uncontrolled discretion to manage and interpret the Plan and, in particular, to determine who is entitled to a benefit and the amount of the

benefit. However, if you have a complaint regarding the nonpayment of all or part of a Plan benefit, you or your duly authorized representative may mail or deliver a letter stating your complaint to the person or office responsible for Fifth Third's employee benefits. Using this claims procedure (and the claims review procedure described below) is required before you may file a lawsuit regarding the Plan or your benefit under the Plan.

The Claims Review Committee will decide upon a claim within a reasonable period of time, but in no more than 90 days, unless special circumstances require an extension of time. If an extension of time is required, you will be notified prior to the end of the original 90 days, including the date a decision is expected.

Review of a Denied Claim

If you receive notice that your claim has been wholly or partially denied or if you have heard nothing about your claim for 90 days, you or your duly authorized representative may, within 60 days or otherwise reasonable time, review pertinent documents, submit issues and comments in writing, and obtain a full and fair review by mailing or delivering a written request to the person or office responsible for Fifth Third's employee benefits. If you do not request a review within the specified time period, the denial of the claim will be binding and you may not later challenge that denial.

If you request a review, then the Claims Review Committee will make a decision no later than 60 days after receiving your request for review, unless special circumstances require an extension of time for

processing. If such an extension is required, you will be notified prior to its commencement. In any event, the decision will be made as soon as possible, but not later than 120 days after receipt of your request.

The Claims Review Committee shall have the sole, absolute and uncontrolled discretion to decide all claims under the initial claims procedure and under the claims review procedure, and its decisions shall be binding on all parties.

Required Exhaustion of Administrative Remedies

Before you may file a lawsuit regarding the Plan or your benefits under the Plan, you must first use the claims procedures and the claims review procedures (including the requirement of a timely request for review) described above.

STATEMENT OF ERISA RIGHTS

As a participant in the Plan, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

(1) Examine, without charge, at the plan administrator's office and at other specified locations, all plan documents, including copies of all documents filed by the Plan with the U. S. Department of Labor, such as detailed annual reports and plan descriptions.

(2) Obtain copies of all plan documents and other plan information upon written request

to the plan administrator. The plan administrator may make a reasonable charge for the copies.

(3) Receive a summary of the Plan's annual financial report. The plan administrator is required to furnish each participant with a copy of this summary annual report.

(4) Obtain a statement telling you whether you have a right to receive a benefit at normal retirement age (age 65 with 5 years of vesting service or other age as specified for a predecessor plan) and if so, what your benefits would be at normal retirement age if you stop working under the Plan now. If you do not have a right to a benefit, then the statement will tell you how many more years you have to work to get a right to a benefit. This statement must be requested in writing and is not required to be given more than once a year. The Plan must provide the statement free of charge.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the plan. The people who operate the Plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA. If your claim for a benefit is denied in whole or in part, you must receive a written explanation of the reason for the denial. You

have the right to have the Plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the Plan and do not receive them within 30 days, then you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the plan administrator. If you have a claim for a benefit which is denied or ignored, in whole or in part, then you may file suit in a state or federal court provided you first have exhausted all administrative remedies. In addition, if you disagree with the Plan's decision or lack thereof concerning the qualified status of a domestic relations order, you may file suit in federal court provided you first have exhausted all administrative remedies. If it should happen that plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, then you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court provided you first have exhausted all administrative remedies. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous. If you should have any questions about this statement or your rights under ERISA, then you should contact the nearest office of the Employee Benefits Security Administration, U. S. Department of Labor listed in your telephone directory or the Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S.

Department of Labor, 200 Constitution Avenue N.W., Washington, D. C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Employee Benefits Security Administration. If you have any questions about the Plan, then you should contact the plan administrator.

SPECIAL PROVISIONS FOR CERTAIN PREDECESSOR PLANS AND AFFILIATES

Special rules apply to employees of certain Fifth Third Affiliates. Only the participants specified below are affected by the special provisions.

Boone State Bank Profit Sharing Plan

Participants who participated in the Boone State Bank Profit Sharing Plan may have special Accounts maintained on their behalf known as the Boone State Account. A participant's Boone State Account reflects his account under the Boone State Bank Profit Sharing Plan as of the date that plan merged into this Plan, adjusted for subsequent gains and losses. A participant's Boone State Account is subject to the same vesting schedule described above applicable to the Frozen Vesting Account.

In accordance with rules prescribed by the plan administrator, you have investment rights over your Boone State Account. Your investment rights over these accounts are the same as your investment rights over your other Accounts (described above under Account Investments).

First Ohio Bancshares, Inc.
Stock Purchase, 401(k) and Savings Plan

Participants who had amounts transferred from the First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan (the "First Ohio Plan") may have special Accounts maintained on their behalf known as the Toledo Matching Account (which is attributable to a transfer from the participant's "Employer Matching Contribution Account" under the First Ohio Plan).

Your rights to the Toledo Matching Account are fully vested at all times.

In accordance with rules prescribed by the plan administrator, you have investment rights over your Toledo Matching Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

New Palestine Bank
Employees' 401(k) Plan

Participants who participated in the New Palestine Bank Employees' 401(k) Plan (the "New Palestine Plan") may have special Accounts maintained on their behalf known as the New Palestine Account. The New Palestine Account reflects a participant's interest attributable to his "Regular Account" under the New Palestine Plan as of the date that plan merged into this Plan, adjusted for subsequent gains and losses. Your rights to the New Palestine Account are fully vested at all times.

In accordance with rules prescribed by the plan administrator, you have investment rights over your

New Palestine Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

The Cumberland Federal Savings Bank's Participation in The Financial Institutions Thrift Plan

Special Accounts

Participants who had amounts transferred from the Financial Institutions Thrift Plan (the "FITP") may have special Accounts maintained on their behalf known as the Cumberland Account, consisting of one or more of the following subaccounts:

Cumberland Regular Account (which is attributable to a transfer from the participant's "Regular Account" under the FITP)

Cumberland 401(k) Account (which is attributable to a transfer from the participant's "401(k) Account" under the FITP)

Cumberland Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" under the FITP)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your

Cumberland 401(k) Account, Cumberland Rollover Account and your Cumberland Regular Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may make a withdrawal from your Cumberland 401(k) Account (excluding earnings and employer contributions). After attainment of age 59-1/2, you may withdraw from your Cumberland 401(k) Account. You may elect to withdraw any part or all of your Cumberland Regular Account and Cumberland Rollover Account. Only one such withdrawal may be made in any quarter.

Mutual Federal Savings Bank Retirement Savings Plan

Special Accounts

Participants who participated in the Mutual Federal Savings Bank Retirement Savings Plan (the "Mutual Federal Plan") may have special Accounts maintained on their behalf known as the Mutual Federal Account (attributable to a participant's "Account" under the Mutual Federal Plan) consisting of one or more of the following subaccounts:

Mutual Federal Discretionary Contribution Account (which is attributable to any discretionary employer contributions and forfeitures allocated to the participant under the Mutual Federal Plan)

Mutual Federal 401(k) Account (which is attributable to a participant's "Elective Deferral Contributions" under the Mutual Federal Plan)

Mutual Federal Matching Contribution Account (which is attributable to any "Matching Contributions" allocated to the participant under the Mutual Federal Plan)

Mutual Federal Rollover Account (which is attributable to a participant's "Rollover Contributions" (if any) under the Mutual Federal Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Mutual Federal Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Mutual Federal 401(k) Account (excluding earnings) and your Mutual Federal Rollover Account.

Falls Savings Bank, FSB
Salary Savings Plan

Special Accounts

Participants who participated in the Falls Savings Bank, FSB Salary Savings Plan (the "Falls Savings Plan") have their benefits from the Falls Savings Plan reflected in a "Falls Savings Account," consisting of one or more of the following subaccounts:

Falls Savings Discretionary Contribution Account (which is attributable to any discretionary employer contributions allocated to the participant under the Falls Savings Plan)

Falls Savings 401(k) Account (which is attributable to a participant's "Elective Contributions" under the Falls Savings Plan)

Falls Savings Rollover Account (which is attributable to a participant's "Rollover Contributions" (if any) under the Falls Savings Plan)

Falls Savings Matching Contribution Account (which is attributable to a participant's "Matching Contributions" under the Falls Savings Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Falls Savings Account. Your investment rights

over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Falls Savings 401(k) Account (excluding earnings) and your Falls Savings Rollover Account.

NBD Bancorp, Inc.
Employees' Savings and Investment Plan

Special Accounts

Participants who had amounts transferred from the NBD Bancorp, Inc. Employees' Savings and Investment Plan (the "NBD Plan") may have special Accounts maintained on their behalf known as the NBD Account, consisting of one or more of the following subaccounts:

NBD Participant Contribution Account (which is attributable to a transfer from the participant's "Participant Contribution Account" under the NBD Plan)

NBD Matching Contribution Account (which is attributable to a transfer from the participant's "Matching Contribution Account" under the NBD Plan)

NBD Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" (if any) under the NBD Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire NBD Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your NBD Participant Contribution Account (excluding earnings) and your NBD Rollover Account. After attainment of age 59-1/2, you may withdraw any part or all of your NBD Account.

First Nationwide Employees' Investment Plan

Special Accounts

Participants who had amounts transferred from the California Federal Employees' Investment Plan (the "Cal Fed Plan") (formerly known as First Nationwide Employees' Investment Plan) may have special Accounts maintained on their behalf known as the Cal Fed Account, consisting of one or more of the following subaccounts:

Cal Fed Profit Sharing Account (which is attributable to a transfer from the participant's "Profit Sharing Account" under the Cal Fed Plan)

Cal Fed Salary Deferral Account (which is attributable to a transfer from the participant's "Salary Deferral Account" and "Prior Plan Salary Deferral Account" under the Cal Fed Plan)

Cal Fed Rollover Account (which is attributable to a transfer from the participant's "Rollover Account" under the Cal Fed Plan)

Cal Fed Company Matching Account (which is attributable to a transfer from the participant's "Company Matching Account" and "Prior Plan Matching Account" under the Cal Fed Plan)

Cal Fed After-Tax Account (which is attributable to a transfer from the participant's "Prior Plan After-Tax Account" under the Cal Fed Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Cal Fed Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may make a withdrawal from your Cal Fed Salary Deferral Account (excluding earnings) and your Cal Fed

Rollover Account. After attainment of age 59-1/2, you may withdraw from your Cal Fed Account once per year. You may elect to withdraw any part or all of your Cal Fed After-Tax Account once every two years.

Fifth Third/The Ohio Company
and
Fifth Third Insurance Agency Corporation

The Ohio Company Profit Sharing Plan Accounts

Participants who participated in The Ohio Company Profit Sharing Plan (the "Ohio Company Profit Sharing Plan") may have special Accounts maintained on their behalf known as The Ohio Company Profit Sharing Account (attributable to a transfer from the participant's "Profit Sharing Account" under The Ohio Company Plan.) Your rights to your Ohio Company Profit Sharing Account are fully vested at all times. In accordance with rules prescribed by the plan administrator, you have investment rights over your Ohio Company Profit Sharing Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

After attainment of age 65, if you have not terminated employment you may withdraw any part or all of your Ohio Company Profit Sharing Account.

Ohio Company Salary Investment Plan

Special Accounts

Participants who participated in The Ohio Company Salary Investment Plan ("Ohio Company SIP") have their benefits from the Ohio Company SIP reflected in

an "Ohio Company SIP Account," consisting of one or more of the following subaccounts:

Ohio Company SIP 401(k) Account (which is attributable to a Participant's "Deferral Contributions" under the Ohio Company SIP)

Ohio Company SIP Rollover Account (which is attributable to a Participant's rollover contributions (if any) under the Ohio Company SIP)

Ohio Company SIP Matching Contribution Account (which is attributable to any "Matching Contributions" allocated under the Ohio Company SIP)

Fully Vested Accounts

Your rights to your Ohio Company SIP Account (including each of its subaccounts) are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Ohio Company SIP Account (including each of its subaccounts). Your investment rights over these amounts are the same as your investment rights over your other Accounts (as described above under Account Investments.)

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your Ohio Company SIP 401(k) Account

(excluding earnings) and your Ohio Company SIP Rollover Account.

If you have not terminated employment, you may make withdrawals from your Ohio Company SIP Matching Contribution Account. You may request such a withdrawal twice each plan year. The amount of such distribution may not be less than the lesser of (i) the balance of your distributable Ohio Company SIP Matching Contribution Account, or (ii) $500.

If you have not terminated employment, but you have withdrawn your Ohio Company SIP Matching Contribution Account, you may make withdrawals from the nonforfeitable portion of your remaining Ohio Company SIP Account if you have reached age 59-1/2. You may request such a withdrawal twice each plan year. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Ohio Company SIP Account, or (b) $500.

Citizens Federal Bank, F.S.B.

Special Accounts

Participants who participated in the Citizens Federal Bank, F.S.B. and Related Companies Amended and Restated Savings and Investment 401(k) Plan (the "Citizens Federal Plan") may have special Accounts maintained on their behalf known as the Citizens Federal Account (attributable to their accounts under the Citizens Federal Plan) consisting of one or more of the following subaccounts:

Citizens Federal Participant's Elective Account (which is attributable to a "Participant's Elective Account" under the Citizens Federal Plan)

Citizens Federal Participant's Account (which is attributable to a "Participant's Account" and "Restricted Stock Account" under the Citizens Federal Plan)

Citizens Federal Participant's Rollover Account (which is attributable to a "Participant's Rollover Account" (if any) under the Citizens Federal Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Citizens Federal Account. Your investment rights over these amounts are the same as your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw first from your Citizens Federal Participant's Account and your Citizens Federal Rollover Account, and then from your Citizens Federal Participant's Elective Account (excluding earnings). Hardship withdrawals will be paid in a lump sum.

State Savings Bank, Century Bank and State Savings Bank, F.S.B.

Special Accounts

Participants who participated in the State Savings Bank Profit Sharing Plan (the "State Savings Plan")

may have special Accounts maintained on their behalf known as the State Savings Account (attributable to a participant's "Account" under the State Savings Plan) consisting of one or more of the following subaccounts:

State Savings Employee Pre-Tax Contribution Account (which is attributable to a participant's "Employee Pre-Tax Contribution Account" under the State Savings Plan)

State Savings Employer Nonelective Contribution Account (which is attributable to a participant's "Employer Nonelective Contribution Account" under the State Savings Plan)

State Savings Matching Contribution Account (which is attributable to a participant's "Employer Matching Contribution Account" under the State Savings Plan)

State Savings Rollover Contribution Account (which is attributable to a participant's "Rollover Contribution Account" (if any) under the State Savings Plan)

State Savings Plan Employee After-Tax Contribution Account (which is attributable to participant's "Employee After-Tax Contribution Account" (if any) under the State Savings Plan)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire State Savings Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your State Savings Employee Pre-Tax Contribution Account (excluding earnings) and your State Savings Rollover Account. Any hardship withdrawal will be paid in a single sum.

A participant shall have the right to withdraw, at any time, all or a portion of his State Savings Rollover Contribution Account or his State Savings Employee After-Tax Contribution Account.

A participant who has not terminated employment shall have the right to make withdrawals from his State Savings Account if he has reached age 59-1/2.

Enterprise Federal Savings Bank

Participants who participated in the Enterprise Federal Bancorp, Inc. Employee Stock Ownership Plan (the "Enterprise ESOP") may have special Accounts maintained on their behalf known as the Enterprise ESOP Account which is attributable to their "Company Stock Account" under the Enterprise ESOP. Your rights to your Enterprise ESOP Account are fully vested at all times.

Unless you direct otherwise, your Enterprise ESOP Account shall be invested solely in shares of common stock of Fifth Third Bancorp. The plan administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp stock as part of the Fifth Third Stock Fund, described above, or any other recordkeeping methodology the plan administrator deems appropriate. You have investment rights over your Enterprise ESOP Account. The Fifth Third Stock Fund shall be one of the available investment funds. Your investment rights over your Enterprise ESOP Account are the same as your investment rights over your other Accounts (described above under Account Investments).

To the extent your Enterprise ESOP Account is invested in Fifth Third Bancorp common stock or in the Fifth Third Stock Fund, you are entitled to vote the shares (or the shares represented by your interest in the Fund).

In accordance with rules prescribed by the plan administrator, when you are entitled to a withdrawal or distribution of your Enterprise ESOP Account, you may elect to receive, as part of the withdrawal or distribution, a number of whole shares represented by your interest in common shares of Fifth Third Bancorp or in the Fifth Third Stock Fund.

Participants whose Enterprise ESOP Account is invested in Fifth Third Bancorp common stock may elect to leave dividends payable on the stock in the Plan for reinvestment in Fifth Third common stock or to take dividends in cash. The plan administrator establishes the rules for making this election.

CNB Bancshares, Inc. and Subsidiaries

Special Accounts

Participants who participated in the Citizens Incentive Savings Plan (the "CISP") may have special Accounts maintained on their behalf known as the CISP Account consisting of one or more of the following subaccounts:

CISP Matching Contribution Account (which is attributable to the participant's "Employer Matching Contribution Account" under the CISP)

CISP Discretionary Contribution Account (which is attributable to the participant's "Employer Discretionary Contribution Account" under the CISP)

CISP Merger Account (which is attributable to the participant's "Merger Account" (if any) under the CISP)

Fully Vested Accounts

Your rights to the above special Accounts are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your CISP Matching Contribution Account, CISP Discretionary Contribution Account, and CISP Merger Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

Withdrawals

If you are described below and you have not terminated employment you have the right to make withdrawals (as indicated below) from your Section 401(k) Salary Deferral Account if you have reached age 59-1/2.

First Corporation Participant. A participant in the "First Corporation Savings Plan" on or prior to December 31, 1993 may make age 59-1/2 withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the First Corporation Savings Plan prior to January 1, 1994. No more than two such withdrawals may be made pursuant during a plan year.

Bank of Orleans Participant. A participant in the "Bank of Orleans Retirement Savings Plan" on or prior to December 31, 1995 may make age 59-1/2 withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the Bank of Orleans Retirement Savings Plan prior to December 31, 1995. No more than one such withdrawal may be made during a plan year.

Ottawa Financial Corporation and Subsidiaries

Participants who participated in the Ottawa Financial Corporation Employee Stock Ownership Plan (the "Ottawa ESOP") may have a special Account maintained on their behalf known as the Ottawa ESOP Participant Account (which is attributable to the participant's "Employee Stock Ownership Account" under the Ottawa ESOP).

Your rights to your Ottawa ESOP Participant Account are fully vested at all times.

Unless you direct otherwise, your Ottawa ESOP Participant Account will be invested solely in shares of common stock of Fifth Third Bancorp. The plan administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp stock as part of the Fifth Third Stock Fund, described above, or any other recordkeeping methodology the plan administrator deems appropriate. You have investment rights over your Ottawa ESOP Participant Account. The Fifth Third Stock Fund shall be one of the available investment options. Your investment rights over your Ottawa ESOP Participant Account are the same as your investment rights over your other Accounts (described above under Account Investments).

Participants whose Ottawa ESOP Participant Account is invested in Fifth Third Bancorp common stock may elect to leave dividends payable on the stock in the Plan for reinvestment in Fifth Third common stock or to take the dividends in cash. The plan administrator establishes the rules for making this election.

To the extent your Ottawa ESOP Participant Account is invested in shares of Fifth Third Bancorp common stock or in the Fifth Third Stock Fund, you are entitled to vote the shares (or the shares represented by your interest in the Fund).

In accordance with rules prescribed by the plan administrator, when you are entitled to a distribution of your Ottawa ESOP Participant Account, to the extent invested in shares of common stock of Fifth Third Bancorp, including if that investment is

represented by an interest in the Fifth Third Stock Fund, you may elect to receive, as part of that distribution, a number of whole shares of Fifth Third Bancorp common stock.

Old Kent Financial Corporation and Subsidiaries

Special Accounts

Participants who participated in the Old Kent Thrift Plan (the "Old Kent Plan") may have special Accounts maintained on their behalf known as the Old Kent Account consisting of one or more of the following subaccounts:

Old Kent Thrift Plus Account (which is attributable to a participant's "Thrift Plus Account" under the Old Kent Plan)

Old Kent Regular Account (which is attributable to a participant's "Regular Account" under the Old Kent Plan)

Old Kent Matching Account (which is attributable to a participant's "Matching Account" under the Old Kent Thrift Plan)

Old Kent Rollover/Transfer Account (which is attributable to a participant's "Rollover/Transfer Account" under the Old Kent Plan)

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire Old Kent Account. Your investment rights over these amounts are the same as your investment rights

over your other Accounts (described above under Account Investments).

Vesting

Your rights to your Old Kent Thrift Plus Account, Old Kent Regular Account and Old Kent Rollover/Transfer Account shall be nonforfeitable at all times. You shall have a nonforfeitable right to a percentage of your Old Kent Matching Account pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 5	0%
5 or more	100%

Upon attaining age 55, and if you are employed by Fifth Third or an affiliate, you have a nonforfeitable right to your Old Kent Matching Account. Additionally, if your employment terminates because of your death or disability, your Old Kent Matching Account will be fully vested. The forfeiture rules described above under Vesting generally apply to your Old Kent Matching Account.

Your rights to any net earnings credited to your Old Kent Matching Account are nonforfeitable at all times.

Service

For purposes of vesting of a participant's Old Kent Matching Account, service under the Old Kent Thrift Plan will be treated as service under this Plan based on the Old Kent Thrift Plan's hour counting method through the period ending December 31, 2001. Service shall be credited using this Plan's elapsed time method beginning January 1, 2002. (See the section above on

Vesting Years.) For purposes of determining a participant's eligibility, a participant's past service with Old Kent Financial Corporation (or any subsidiary of Old Kent Financial Corporation) will be taken into account under the elapsed time method of this Plan.

In-Service Withdrawals

(1) No Hardship Withdrawals. In no event shall the hardship withdrawal provisions (described above under Hardship Withdrawals) apply to any part of a participant's Old Kent Account.

(2) Old Kent Matching and Regular Account Total Withdrawal. A participant who has not terminated employment may withdraw the total (and not less than the total) value of the nonforfeitable portion of his Old Kent Matching Account and Old Kent Regular Account. No amount held in the participant's Old Kent Matching Account less than two years shall be distributed unless the participant has been a participant for at least 60 months or has credit for at least 5 vesting years. A participant who elects a total withdrawal hereunder shall forfeit the forfeitable portion of his Old Kent Matching Account. If there is a forfeiture, the participant shall be entitled to a restoration of the forfeited amount upon repayment of the entire amount as provided by the Plan.

(3) Old Kent Regular Account Withdrawal. A participant who has not terminated employment may withdraw all or a portion

from his Old Kent Regular Account in accordance with rules prescribed by the plan administrator.

(4) Withdrawals from Old Kent Thrift Plus Account After Age 59-1/2. A participant who has not terminated employment may withdraw all or a portion from his Old Kent Thrift Plus Account if he has reached age 59-1/2. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Old Kent Thrift Plus Account, or (b) $100.

(5) Old Kent Rollover/Transfer Account Withdrawal. A participant who has not terminated employment may withdraw the total (and not less than the total) value of his Old Kent Rollover/Transfer Account.

The withdrawal rights under (2), (3) and (4) above (but not (5) above) are subject to the following. A withdrawal under (4) above of the participant's Old Kent Thrift Plus Account may be made at the same time as a withdrawal under (2) or (3) above but otherwise only one of the withdrawals described in (2), (3) and (4) above may be requested at any time. Only one withdrawal under (2), (3) and/or (4) above may be requested in a calendar quarter.

Loans

Any outstanding loans as of the merger of the Old Kent Plan will continue to be administered in accordance with the terms of the Old Kent Plan. A participant may borrow first from his Old Kent Thrift Plus Account and then from his Old Kent Rollover/Transfer Account.

Loans shall be subject to the limitations described above under the section entitled Loans except as follows: a participant may have up to two loans outstanding from his Old Kent Account but a new loan will not be made while any other loans are outstanding.

Distribution of Employer Stock

To the extent the portion of a participant's Old Kent Account is invested in the Fifth Third Stock Fund, the participant may elect, in accordance with rules and procedures established by the plan administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his Old Kent Account (including an in-service withdrawal).

First National Bankshares of Florida, Inc.

Special Accounts

Participants who participated in the First National Bankshares of Florida, Inc. Salary Savings Plan (the "FNB Plan") may have special Accounts maintained on their behalf known as the FNB Account consisting of one or more of the following additional subaccounts:

FNB 401(k) Account (which is attributable to a participant's "Elective Deferral Contributions" under the FNB Plan)

FNB Qualified Matching Account (which is attributable to "Qualified Matching Contributions" ("Matching Contributions" made on or after January 1, 2004) under the FNB Plan)

FNB Pre-2004 Matching Account (which is attributable to "Matching Contributions" made before January 1, 2004 under the FNB Plan)

FNB Additional Contribution Account (which is attributable to "Additional Contributions" under the FNB Plan other than such amounts credited to the FNB Pre-Spin-Off Additional Contribution Account)

FNB Pre-Spin-Off Additional Contribution Account (which is attributable to "Additional Contributions" under the FNB Plan, which immediately after the spin-off of First National Bankshares of Florida, Inc. by F.N.B. Corporation, was invested in F.N.B. Corporation stock)

FNB Rollover Account (which is attributable to a participant's "Rollover Contributions" under the FNB Plan)

Vesting

Your rights to your FNB 401(k) Account, FNB Qualified Matching Account and FNB Rollover Account, if any, shall be nonforfeitable at all times.

You shall have a nonforfeitable right to a percentage of your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account, and your FNB Additional Contribution Account, if any, based on the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 1	0%
1	20%
2	40%
3	60%
4	80%
5 or more	100%

Upon attaining age 62, if you are employed by Fifth Third or an affiliate, you have a nonforfeitable right to your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account, and FNB Additional Contribution Account, if any. Additionally, if your employment terminates because of your death or disability, your FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account and FNB Additional Contribution Account, if any, will be fully vested.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire FNB Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

In-Service Withdrawals

Hardship Withdrawals. If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw first from your FNB Rollover Account and then from your FNB 401(k) Account (excluding earnings).

In-Service Withdrawals After Age 59-½. If you have not terminated employment, you may make withdrawals from your FNB Account if you have reached age 59½.

Loans

Any loans outstanding when the FNB Plan merged will continue to be administered in accordance with the terms of the FNB Plan. A participant may borrow from

his FNB 401(k) Account and his FNB Rollover Account. Loans will be subject to the limitations described above under the section entitled Loans except as follows: A participant may have up to two loans outstanding from his FNB Account and up to one loan outstanding from other available subaccounts under the Plan. However, a new loan will not be made while any other loans are outstanding.

W. Lyman Case & Company

Special Accounts

Participants who participated in the W. Lyman Case & Company 401(k) Profit Sharing Plan (the "WLC Plan") may have special Accounts maintained on their behalf known as the WLC Account consisting of one or more of the following additional subaccounts:

WLC 401(k) Account (which is attributable to a participant's "elective deferrals" under the WLC Plan)

WLC Employer Matching Account (which is attributable to "matching contributions" under the WLC Plan)

WLC Rollover Account (which is attributable to a participant's "rollover contributions" under the WLC Plan)

Vesting

Your rights to your WLC Account are fully vested at all times.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire WLC Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments).

In-Service Withdrawals

Hardship Withdrawals. If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your WLC 401(k) Account (excluding earnings).

In-Service Withdrawals After Age 59-½. If you have not terminated employment, you may make withdrawals from your WLC Account if you have reached age 59½. You may request such a withdrawal only once per plan year.

First Charter Corporation and Subsidiaries

Special Accounts

Participants who participated in the First Charter Corporation Retirement Savings Plan (the "First Charter Plan") may have special Accounts maintained on their behalf known as the First Charter Account consisting of one or more of the following additional subaccounts:

First Charter 401(k:) Account (which is attributable to a participant's "Deferral Subaccount" under the First Charter Plan)

First Charter After-Tax Account (which is attributable to a participant's "Extra Savings Subaccount" under the First Charter Plan)

First Charter Profit Sharing Account (which is attributable to a participant's "Company Discretionary Contribution Subaccount" under the First Charter Plan)

First Charter Matching Account (which is attributable to a participant's "Match Subaccount" under the First Charter Plan)

First Charter Qualified Nonelective Account (which is attributable to a participant's "Bank Savings Subaccount" under the First Charter Plan)

First Charter Rollover Account (which is attributable to a participant's "Rollover Subaccount" under the First Charter Plan)

Vesting

Your rights to your First Charter 401(k) Account, First Charter After-Tax Account, First Charter Qualified Nonelective Account and First Charter Rollover Account, if any, shall be nonforfeitable at all times.

You shall have a nonforfeitable right to a percentage of your First Charter Matching Account and First Charter Profit Sharing Account, if any, based on the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 2	0%
2	25%
3	50%
4	75%
5 or more	100%

Upon attaining age 65, if you are employed by Fifth Third or an affiliate, you have a nonforfeitable right to your First Charter Matching Account and First Charter Profit Sharing Account, if any. Additionally, if your employment terminates because of your death or disability, your First Charter Matching Account and First Charter Profit Sharing Account, if any, will be fully vested.

Investments

In accordance with rules prescribed by the plan administrator, you have investment rights over your entire First Charter Account. Your investment rights over these amounts are the same as your investment rights over your other Accounts (described above under Account Investments). In addition to the investment funds available under the Plan generally, the Federated Capital Preservation Fund is temporarily available.

No new investments (through investment transfers or contributions) can be made into this investment option. In accordance with rules prescribed by the plan administrator, you may elect to transfer part or all of your First Charter Account out of this investment option and into other available investment options.

However, such amounts may not be transferred back into this investment option.

Effective on a date determined by the plan administrator, the Federated Capital Preservation Fund will be eliminated. Any First Charter Accounts allocated to that investment option will be re-allocated to another investment option at that time.

In-Service Withdrawals

Hardship Withdrawals. If you otherwise qualify for a hardship withdrawal (see the section above on Hardship Withdrawals), you may withdraw from your First Charter 401(k) Account (excluding earnings) in a single sum.

In-Service Withdrawals After Age 59-½. If you have not terminated employment, you may make withdrawals from your First Charter Account if you have reached age 59½.

First Charter After-Tax Account Withdrawal. If you have not terminated employment, you may make withdrawals from your First Charter After-Tax Account, no more than once per quarter.

First Charter Rollover Account Withdrawal. If you have not terminated employment, you may make withdrawals from your First Charter Rollover Account, no more than once per quarter.

Loans

Any loans outstanding when the First Charter Plan merged will continue to be administered in accordance with the terms of the First Charter Plan. A participant may borrow from his First Charter 401(k) Account and

his First Charter Rollover Account. Loans will be subject to the limitations described above under the section entitled Loans except as follows: A participant may have a loan outstanding from his First Charter Account and up to one loan outstanding from other available subaccounts under the Plan. However, a new loan will not be made while any other loans are outstanding.

Money Purchase Pension Plan Spin-Off

The First Charter Plan, prior to merging into this Plan, maintained certain "money purchase pension plan" accounts from a prior merged plan. Those "money purchase pension plan" accounts have now been spun-off to a separate plan which has terminated. If you had a "money purchase pension plan" account, you will receive additional information in connection with that plan termination.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 27 2014
OFFICE OF THE CLERK

No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX, Volume 2

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Andrew L. Zivitz
Counsel of Record
Joseph H. Meltzer
Edward W. Ciolko
Shannon O. Braden
Kessler Topaz Meltzer & Check, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

Counsel for Respondents

Petition for Writ of Certiorari filed December 14, 2012
Petition for Writ of Certiorari granted December 13, 2013

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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EXHIBIT D

ORGANIZATION AND AUTHORITY
OF THE
FIFTH THIRD BANK
PENSION, PROFIT SHARING AND MEDICAL
PLAN COMMITTEE

RECITALS

WHEREAS, the Fifth Third Bank Pension and Profit Sharing Committee heretofore has served as plan administrator of the Fifth Third Bancorp Master Profit Sharing Plan and the Fifth Third Bancorp Master Retirement Plan with the duties and authority described in such plans and in the "Organization and Authority" instrument dated December 29, 1969;

WHEREAS, the Board of Directors of Fifth Third Bank would like to expand such duties to include duties with respect to any self-funded medical plan the Bank may adopt; and

WHEREAS, the Board of Directors would like to expand such duties to include duties with respect to certain employee benefit plans that may be assumed in connection with future acquisitions;

WHEREAS, the Board of Directors would like to generally update and modernize the "Organization and Authority" instrument describing the powers of the Committee.

NOW THEREFORE, upon approval of this instrument by the Board of Directors, the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee shall be granted the powers and duties

stated herein and this governing instrument shall supersede and replace entirely any and all prior organizational instruments.

Section 1. Organization

1.1 The Committee shall be known as the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee. The Committee is a continuation of the Fifth Third Bank Pension and Profit Sharing Committee. References in Applicable Plan documents to the Fifth Third Bank Pension and Profit Sharing Committee shall be deemed to be references to this Committee.

1.2 The Committee shall be composed of at least three members appointed, in writing, by the President of Fifth Third Bank ("President").

1.3 The Committee shall designate one of its members to serve as Chairman of the Committee and another of its members to serve as Secretary of the Committee.

1.4 A member may resign from the Committee by notifying the President, in writing, and may be removed from the Committee by the President

1.5 The Committee shall meet upon the request of any member of the Committee.

1.6 A majority of the members of the Committee shall constitute a quorum. The Committee may act with or without a formal meeting.

1.7 The Committee may establish rules for the conduct of its business.

1.8 The Secretary of the Committee shall maintain a record of the proceedings of the Committee. The Chairman or Secretary, or any member designated by the Chairman, shall certify as to the action of the Committee, and any person may rely upon such certification.

1.9 A member of the Committee shall not be entitled to vote upon any matter which affects solely the payment of his benefits.

1.10 The Chairman may appoint another member of the Committee as Vice Chairman to act at any time the Chairman is unable to serve, and may give to a Vice Chairman such authority as he thinks necessary.

1.11 Fifth Third Bank shall protect each member from any liability incurred as a member of the Committee, except for fraud or dishonesty.

Section2. Powers and Authority

2.1 The Committee shall administer The Fifth Third Bancorp Master Profit Sharing Plan, The Fifth Third Bancorp Master Retirement Plan and any self-funded medical plan, that may be adopted ("Applicable Plans"), with the powers and duties set forth below. Whenever the powers and duties of the Committee, set forth below, appear to conflict with the powers and duties as contained in the legal documents governing any of the Applicable Plans, the provisions of the particular Applicable Plan shall govern.

2.2 The Committee shall act as the "plan administrator" as defined in the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for all Applicable Plans. The Committee shall have all

responsibilities and powers given to the plan administrator as described in the Applicable Plan documents.

2.3 The Committee shall have the power and authority in its sole, absolute and uncontrolled discretion to:

(a) interpret plan provisions and to respond to questions concerning plan administration.

(b) adopt and change rules for the administration and operation of the plans.

(c) determine who is a participant.

(d) determine the rights or benefits (if any) of any individual under the plans.

(e) determine when, to whom, and in what form distributions are to be made.

(f) exercise such power and authority with regard to any fund or trust fund as may be necessary or appropriate in the administration of the plans.

Benefits under an Applicable Plan will be paid only if the Committee, or its delegate, decides in its discretion that the applicant is entitled to them.

2.4 The Committee shall have the authority to establish, review and amend guidelines and policies for investment of plan assets, appoint and remove trustees and investment managers and all other matters incident thereto.

2.5 The Committee shall have the authority to engage or remove any provider of benefits under any plan and any outside service provider, including but not limited to actuaries, record keepers, administrators and consultants.

2.6 The Committee may engage legal counsel to assist in the fulfillment of its duties.

2.7 Any rule or determination made by the Committee within its authority shall be binding on all parties.

2.8 The Committee shall have the non-exclusive authority to amend any of the Applicable Plans.

2.9 The Committee shall have the authority to terminate any Applicable Plan.

2.10 The Committee shall have such additional powers and responsibilities as the President may determine from time to time.

2.11 Any employee benefit plan that may be assumed in an acquisition may be considered an Applicable Plan hereunder to the extent provided by plan amendment or otherwise.

2.12 By action of the President, any other employee benefit plan may be considered an Applicable Plan to the extent determined by the President

Section 3. Administration and Procedure

3.1 The Committee may appoint subcommittees or representatives and employ agents or counsel, and give to each such powers as the Committee may deem

necessary to fulfill any assignments designated by the Committee.

3.2 The Committee may delegate to any of its members authority to sign, on behalf of Fifth Third Bank or the Committee, any documents or instruments that may be necessary in the administration of the plans.

3.3 The Committee may delegate to one or more persons, entities or committees, certain of its duties hereunder. By way of example and not by way of limitation, the Committee may delegate day-to-day operational functions associated with the Applicable Plans to the Benefits Department of the Fifth Third Bank.

3.4 The Committee may rely upon the accuracy of any information supplied by Fifth Third Bank or its agents.

3.5 No determination by the Committee in one case shall require retroactive adjustment in any prior case.

3.6 Any question that the Committee may not be able to resolve as to its authority, shall be referred to the President for determination.

3.7 The Committee shall report. to the President upon the operation of the Applicable Plans when requested to do so, but not less frequently than once in each fiscal year.

3.8 Fifth Third Bank shall be responsible for all costs and expenses incurred by the Committee in carrying out its functions.

Section4. Claims and Claim Review Procedures

4.1 The Committee shall be responsible for appointing one or more committees, members of which need not be members of this Committee, to decide claims and claim reviews under the claims and claim review procedures under the Applicable Plans. Each such committee as may be appointed by this Committee shall have all power and authority necessary to decide claims and claim reviews.

Section 5. Amendment and Revocation

5.1 The organization and delegation of powers and duties to the Committee may be amended or revoked in whole or in part at any time by the Board of Directors or the President.

Date Approved by Board of Directors: _____

EXHIBIT F

THIS DOCUMENT CONSTITUTES PART OF A PROSPECTUS COVERING SECURITIES THAT HAVE BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933.

THE FIFTH THIRD BANCORP
38 FOUNTAIN SQUARE PLAZA
FIFTH THIRD CENTER
CINCINNATI, OHIO 45202

SHARES OF COMMON STOCK

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

COMMON STOCK INFORMATION:

NASDAQ GLOBAL SELECT MARKET —FITB

This prospectus relates to shares of the common stock, without par value (the "Common Stock"), of The Fifth Third Bancorp which may be acquired under The Fifth Third Bancorp Master Profit Sharing Plan (the "Plan").

Neither the SEC nor any state securities regulator has approved or disapproved the common stock to be issued under this prospectus or determined if this prospectus is accurate or adequate. Any representation to the contrary is a criminal offense.

You should rely only on the information contained or incorporated by reference in this prospectus. We have not authorized any person to provide you with different information. If anyone provides you with different or inconsistent information, you should not rely on it. We are not making an offer to sell our common stock in any jurisdiction where the offer or sale is not permitted. You should assume that the information appearing in this prospectus or any other documents incorporated by reference is accurate only as of the date on the front cover of the applicable document. Our business, financial condition, results of operations and prospects may have changed since that date.

The date of this prospectus is October 1, 2008

PLAN INFORMATION

For information regarding the operation of the Plan, please refer to the Summary Plan Description of The Fifth Third Bancorp Master Profit Sharing Plan (the "SPD"). The entire SPD is incorporated by reference into this prospectus.

You may request a copy of SPD, which we will send to you at no cost, by contacting us in the manner set forth below under, "Information Regarding The Fifth Third Bancorp—Obtaining Information."

References in this prospectus to "we," "us" and "Fifth Third" refer to The Fifth Third Bancorp.

INFORMATION REGARDING THE FIFTH THIRD BANCORP

Available Information

We are subject to the information and reporting requirements of the Securities Exchange Act of 1934, under which we file annual, quarterly and special reports, proxy statements and other information with the Securities and Exchange Commission. You may read and copy this information at prescribed rates at the SEC's Public Reference Room located at 100 F Street, N.E., Washington, D.C. 20549. Please call the SEC at (800) 732-0330 for further information about the Public Reference Room. The SEC also maintains an Internet website that contains reports, proxy statements and other information about issuers that file electronically with the Securities and Exchange Commission. The address of that site is *www.sec.gov*. You may also access these filings free of charge through our Internet site at www.53.com. Other than the

information specifically incorporated by reference in this prospectus, information on our website is not part of this prospectus.

Our common stock is listed on the Nasdaq Global Select Market under the symbol "FITB." Reports, proxy statements and other information regarding our company may be read and copied at the offices of Nasdaq located at Financial Industry Regulatory Authority Reports Section, 1735 K Street, N.W., Washington, D.C. 20006.

The SEC allows us to incorporate by reference into this prospectus the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is an important part of this prospectus, and information that we subsequently file with the SEC will automatically update and supersede information in this prospectus and in our other filings with the SEC. In other words, in case of a conflict or inconsistency between information contained in this prospectus and information incorporated by reference into this prospectus, you should rely on the information that was filed later.

We incorporate by reference the documents listed below, which we have already filed with the SEC, and any documents we file with the SEC in the future under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934 (other than information in such future filings deemed not to have been filed), until we sell all the securities offered by this prospectus:

- Annual Report on Form 10-K for the year ended December 31, 2007, as amended;
- Quarterly Reports on Form 10-Q for the quarters ended March 31, 2008 and June 30, 2008;
- Current Reports on Form 8-K filed on January 14, 2008, February 25, 2008, February 28, 2008, April 23, 2008, April 24, 2008, May 2, 2008, May 5, 2008, May 6, 2008, June 6, 2008, June 18, 2008, June 19, 2008, June 24, 2008 and June 25, 2008; and
- The description of our common stock contained in a registration statement filed under the Securities Exchange Act of 1934, including any amendment or report filed for the purpose of updating such description.

Obtaining Information

We will provide you with a copy of any of these documents we are incorporating by reference, at no cost, by writing or telephoning us at the address or telephone number provided below. Also available without charge, upon written or oral request, are the documents required to be delivered to employees under Rule 428(b) promulgated under the Securities Act of 1933. Exhibits to our filings will not be sent unless those exhibits have been specifically incorporated by reference into this prospectus. Requests should be made to:

Paul L. Reynolds
Executive Vice President, General Counsel and Secretary
Fifth Third Bancorp Fifth Third Center 38 Fountain Square Plaza MD10AT76
Cincinnati, OH 45263 (513) 579-5300

Forward Looking Statements

This prospectus and the information incorporated by reference under "Information Regarding The Fifth Third Bancorp—Available Information" contain statements that we believe are "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933 and Rule 175 promulgated thereunder, and Section 21E of the Securities Exchange Act of 1934 and Rule 3b-6 promulgated thereunder. These statements relate to our financial condition, results of operations, plans, objectives, future performance or business. Forward-looking statements usually can be identified by the use of forward-looking language such as "will likely result," "may," "are expected to," "is anticipated," "estimate," "forecast," "projected," "intends to," or may include other similar words or phrases such as "believes," "plans," "trend," "objective," "continue," "remain," or similar expressions, or future or conditional verbs such as "will," "would," "should," "could," "might," "can," or similar verbs. You should not place undue reliance on these statements, as they are subject to risks and uncertainties, including but not limited to those described in this prospectus or the documents incorporated by reference, including the risk factors set forth in our most recent Annual Report on Form 10-K and in our Quarterly Reports on Form 10-Q for periods after our most recent fiscal year end. When considering

these forward-looking statements, you should keep in mind these risks and uncertainties, as well as any cautionary statements we may make. Moreover, you should treat these statements as speaking only as of the date they are made and based only on information then actually known to us.

There are a number of important factors that could cause future results to differ materially from historical performance and these forward-looking statements. Factors that might cause such a difference include, but are not limited to: (1) general economic conditions, either national or in the states in which Fifth Third, one or more acquired entities and/or the combined company do business, are less favorable than expected; (2) political developments, wars or other hostilities may disrupt or increase volatility in securities markets or other economic conditions; (3) changes in the interest rate environment reduce interest margins; (4) prepayment speeds, loan origination and sale volumes, charge-offs and loan loss provisions; (5) our ability to maintain required capital levels and adequate sources of funding and liquidity; (6) changes and trends in capital markets; (7) competitive pressures among depository institutions increase significantly; (8) effects of critical accounting policies and judgments; (9) changes in accounting policies or procedures as may be required by the Financial Accounting Standards Board or other regulatory agencies; (10) legislative or regulatory changes or actions, or significant litigation, adversely affect Fifth Third, one or more acquired entities and/or the combined company or the businesses in which Fifth Third, one or more acquired entities and/or the combined company are engaged; (11) ability to maintain favorable ratings from rating agencies;

(12) fluctuation of Fifth Third's stock price; (13) ability to attract and retain key personnel; (14) ability to receive dividends from its subsidiaries; (15) potentially dilutive effect of future acquisitions on current shareholders' ownership of Fifth Third; (16) effects of accounting or financial results of one or more acquired entity; (17) difficulties in combining the operations of acquired entities; (18) ability to secure confidential information through the use of computer systems and telecommunications network; and (19) the impact of reputational risk created by these developments on such matters as business generation and retention, funding and liquidity.

You should refer to our periodic and current reports filed with the SEC for further information on other factors which could cause actual results to be significantly different from those expressed or implied by these forward-looking statements. See "Information Regarding The Fifth Third Bancorp—Available Information" above.

All forward-looking statements address matters that involve risks and uncertainties. Accordingly, there are or will be important factors that could cause actual results to differ materially from those indicated in these statements. We do not undertake any obligation to publicly update or review any forward-looking statement.

2686655.1

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

as amended and restated effective as of December 31, 2000

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ARTICLE 1

INTRODUCTION AND PURPOSE

1.1 Amendment and Restatement. Fifth Third Bank hereby amends and restates The Fifth Third Bancorp Master Profit Sharing Plan in its entirety, effective as of December 31, 2000; provided however, such other effective dates as are specified in the Plan for particular provisions shall be applicable.

1.2 Purposes of the Plan. The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries. Except as otherwise provided by Sections 4.8 and 5.2, the assets of the Plan shall be held for the exclusive purpose of providing benefits to Participants and their beneficiaries and defraying reasonable expenses of administering the Plan, and it shall be impossible for any part of the assets or income of the Plan to be used for, or diverted to, purposes other than such exclusive purposes. In accordance with section 401(a)(27) of the Code, the Plan is hereby designated as a profit sharing plan except with respect to the following portions of the Plan which shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code, designed to invest primarily in qualifying employer securities:

(a) the portion of the Plan attributable to Employer matching contributions under Section 4.4 (credited to the Employer Matching Accounts);

(b) the Enterprise ESOP Accounts referred to in Appendix XV;

(c) the Ottawa ESOP Participant Accounts referred to in Appendix XVII;

(d) the CISP Matching Contribution Account referred to in Appendix XVI; and

(e) effective December 31, 2001, the Fifth Third Stock Fund (as described in Section 7.4) and the Fifth Third Stock Investment Option (as described in paragraph 2(d) of Appendix XVIII).

1.3 Plan Merger. In the event another plan merged into the Plan or the Old Plan after the effective date of any "GUST" provision and before having been amended for such GUST provision, then provisions in this Plan affecting qualification under section 401 of the Code with effective dates on or before the merger date shall be treated as amendments to such other plan, as it existed prior to the merger, effective as of the same effective dates. For this purpose, "GUST" refers to the Uruguay Round Agreements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997 and the Internal Revenue Service Restructuring and Reform Act of 1998.

ARTICLE 2

DEFINITIONS

As used in the Plan, the following terms, when capitalized, shall have the following meanings, except when otherwise indicated by the context:

2.1 "Account" means, with respect to a Participant, his allocable share of the Plan Assets. A Participant's

Account under the Plan may include one or more of the following subaccounts:

(a) After-Tax Account;

(b) Employer Matching Account;

(c) Frozen Cash Election Account;

(d) Frozen Vesting Account;

(e) Profit Sharing Account;

(f) Rollover Account; and

(g) Section 401(k) Salary Deferral Account.

A Participant's Account also may include applicable subaccounts as specified under an Appendix to the Plan. A Participant's account, if any, under a Predecessor Plan which merges into, or makes transfers to, this Plan, shall be allocated to the appropriate subaccounts as determined by the Administrator. The establishment and maintenance of separate Accounts under the Plan is for accounting purposes and a segregation and separate investment of each Account shall not be required.

2.2 "Accounting Date" means the last day of each June, September, December and March; provided, however, if such last day falls on a Saturday, Sunday, or holiday, then the preceding business day shall be the Accounting Date.

2.3 (a) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.5 on voluntary after-tax Participant contributions means, for a group of Participants for a Plan Year, the average

of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employee's voluntary after-tax Participant contributions actually contributed under Section 4.5 during the Plan Year, to

(2) the Employee's Annual Compensation for such Plan Year.

(b) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.4 on Employer matching contributions means, for a group of Participants for a Plan Year the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employer match contributed to the Plan for such Plan Year under Section 4.4 on behalf of each such Employee, to

(2) the Employee's Annual Compensation for such Plan Year.

(c) In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.5 on voluntary after-tax Participant contributions, Employer matching contributions under Section 4.4 shall not be taken into account. In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.4 on Employer matching contributions, voluntary after-tax Participant contributions under Section 4.5 shall not be taken into account. For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all plans described in section 401(a) of the Code or arrangements described in section

401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one such plan or arrangement; provided, however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other parts of the Plan.

(d) If the Plan satisfies the requirements of section 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Contribution Percentages and for determining whether the nondiscrimination rules of Section 4.5(b) or 4.4, as the case may be, are satisfied.

(e) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.4 (a) "Actual Deferral Percentage" for a group of Participants for a Plan Year is the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the compensation reduction contributions on behalf of each such Employee for such Plan Year under Section 4.1(a), plus any amounts contributed on behalf of each such Employee for the Plan Year under Section 4.3(b), to

(2) the Employee's Annual Compensation for such Plan Year.

(b) For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all cash or deferred arrangements under section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one cash or deferred arrangement under section 401(k) of the Code; provided however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other portions of the Plan.

(c) If the Plan satisfies the requirements of section 401(k) , 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Deferral Percentages and for determining whether the nondiscrimination rules of Section 4.3(c) are satisfied.

(d) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.5 "Administrator" or "Plan Administrator" means the Fifth Third Bank Pension and Profit Sharing Committee. Members of said Committee shall be appointed by, and serve at the pleasure of, the President and Chief Executive Officer of Fifth Third Bank. A reference to the Plan Administrator includes, where applicable, its delegate.

2.6 "Affiliate" means each of the following for such period of time as is applicable under section 414 of the Code:

(a) a corporation which, together with the Employer, is a member of a controlled group of corporations within the meaning of section 414(b) of the Code (as modified by section 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(b) a trade or business (whether or not incorporated) with which the Employer is under common control within the meaning of section 414(c) of the Code (as modified by section 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(c) an organization which, together with the Employer, is a member of an affiliated service group (as defined in section 414(m) of the Code); and

(d) any other entity required to be aggregated with the Employer under section 414(o) of the Code.

2.7 "After-Tax Account" means the separate portion of each Participant's Account which reflects the Participant's nondeductible voluntary contributions, as adjusted in accordance with Article 7.

2.8 "Annual Compensation" means the remuneration (before reduction for withheld amounts) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer during

a Plan Year, from and after becoming a Participant, in the form of base wages or salary, overtime, variable compensation, and similar compensation, but excluding payments made pursuant to product-focused incentive plans, Jeanie maintenance payments, tuition refund reimbursements, Profit Sharing Flex Dollars (whether or not received in cash), and similar payments and benefits. Performance-based additional cash compensation incentives (other than variable compensation) shall be excluded from Annual Compensation unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all Employees or all Non-Highly Compensated Employees covered by such incentive program; provided, however, in all events an Employee eligible under a performance-based additional cash compensation incentive program (other than variable compensation) shall have his Annual Compensation limited to $125,000 for the Plan Year. For purposes of allocating profit sharing contributions under Section 4.2, "Annual Compensation" prior to a Participant's completion of one Eligibility Year shall be disregarded.

Solely for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage, the Administrator, in its discretion, may use the definition of "Annual Compensation" set forth in the above paragraph, or the following definition. If the Administrator so determines, "Annual Compensation" for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage shall mean the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for

which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code) which is paid by the Employer to an Employee during a Plan Year including amounts that otherwise would have been included within this definition but for section 402(a)(8) of the Code (relating to a salary reduction election under section 401(k) of the Code), section 125 of the Code (relating to the cafeteria or flexible benefit plans), section 132(f)(4) (effective for Plan Years beginning after December 30, 2000), section 402(h) of the Code (relating to SEPs), section 403(b) of the Code (relating to certain tax deferred annuities), section 457(b) of the Code (relating to deferred compensation plans of state and local governments and tax-exempt organizations), section 414(h)(2) of the Code (relating to certain picked-up employee contributions). For purposes of determining the Actual Contribution Percentage applicable to Employer matching contributions, the Administrator may either exclude, or include, such Annual Compensation paid to an Employee prior to the time he completes one Eligibility Year.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Annual Compensation shall be taken into account. Effective for Plan Years beginning after December 31,

1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.9 "Beneficiary" means the person or persons entitled to receive the distributions, if any, payable under the Plan upon or after a Participant's death, as such Participant's Beneficiary. Each Participant may designate a Beneficiary by filing the proper form with the Administrator. A Participant may designate one or more contingent Beneficiaries to receive any distributions after the death of a prior Beneficiary. A designation shall be effective upon said filing, provided that it is so filed during such Participant's lifetime, and may be changed from time to time by the Participant; provided however, if a Participant has at least one Hour of Service or at least one hour of paid leave from the Employer (or any other employer for whom service is treated as service for the Employer) on or after August 23, 1984 and is survived by a Surviving Spouse, then such spouse shall be his Beneficiary unless the designation of another Beneficiary is consented to by such spouse in a written consent which acknowledges the effect of such designation, acknowledges the specific Beneficiary or Beneficiaries, and is witnessed by a Plan representative or a notary public.

If there is no designated Beneficiary to receive any amount that becomes payable to a Beneficiary, then such amount shall be paid to the person or persons in the first surviving class of the following classes of successive preference beneficiaries, and the members thereof shall receive equal shares of any distribution payable:

Class 1. the Participant's Surviving Spouse;

Class 2. the Participant's surviving children or issue of deceased children, per stirpes;

Class 3. the Participant's surviving parents;

Class 4. the Participant's surviving brothers and sisters; and

Class 5. the Participant's executor or administrator.

2.10 "Break in Service" means:

(a) before January 1, 1985, a Severance of at least 12 consecutive months; and

(b) after December 31, 1984, a Severance of at least 72 consecutive months; provided however, if as December 31, 1984, service was not required to be taken into account under the provisions of section 410(a) or 411(a) of the Code, then this Subsection (b) shall not cause such service to be taken into account.

2.11 "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.12 "Deferrable Compensation" means Annual Compensation other than variable compensation; plus performance-based additional cash compensation incentives (other than variable compensation) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified

transportation arrangement, from an Employer from and after becoming a Participant whether or not such amounts are considered "Annual Compensation"; plus Profit Sharing Flex Dollars allocable to periods after becoming a Participant (without regard to how the Participant elects to utilize such Profit Sharing Flex Dollars). Prior to December 31, 2001, overtime and shift differential shall also be excluded.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Deferrable Compensation shall be taken into account. Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply. This $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted) limit may be applied proportionately to each pay period or in any other reasonable manner determined by the Administrator or its delegate.

2.13 "Disability" means an incapacity caused by bodily injury or disease which prevents an Employee from performing his regular duties, based upon medical evidence satisfactory to the Administrator.

2.14 "Early Retirement Age" means age 55 and at least 5 Vesting Years.

2.15 "Effective Date" means December 31, 2000.

2.16 "Eligible Participant" means a Participant, described in Section 4.2(c), who is qualified to receive an allocation of the Employer contribution under Section 4.2 for a Plan Year. As provided in an

applicable Appendix, certain individuals may be excluded from the term "Eligible Participant."

2.17 (a) "Eligibility Service" means, subject to (b) below, an individual's Service.

(b) A reemployed person's prior Service shall be disregarded and he shall be treated as a new employee for purposes of determining Eligibility Service if he has incurred a Break in Service and if he did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if such Break in Service equals or exceeds his Eligibility Service before such Break in Service, provided that such Eligibility Service before such Break in Service shall be deemed not to include any of such individual's Eligibility Service not taken into account by reason of any prior Breaks in Service incurred by him.

2.18 "Eligibility Year" means 365 days of Eligibility Service (whether or not continuous).

2.19 "Employee" means an individual who is employed by an Employer and who is considered by the Employer in its sole and absolute discretion to be an Employee for purposes of the Plan. An individual who performs services for the Employer as an independent contractor, leased employee, employee of a temporary agency or in any other capacity other than as an employee of an Employer shall not be considered an Employee for purposes of the Plan. A determination that an individual is an employee of the Employer for other purposes such as employment tax purposes, shall have no bearing whatsoever on the determination of whether the individual is an Employee under the Plan if the Employer does not consider the individual to be

its Employee for purposes of the Plan. As provided in an applicable Appendix, certain individuals may be excluded from the term "Employee."

2.20 "Employer" means Fifth Third Bank and each other subsidiary (direct or indirect) of Fifth Third Bancorp except for any such subsidiary excluded under the terms of the Plan (including an Appendix). An entity shall not be considered an Employer either before or after the time it is a subsidiary (direct or indirect) of Fifth Third Bancorp.

2.21 "Employer Matching Account" means the separate portion of each Participant's Account which reflects the Employer's contributions under Section 4.4 as adjusted in accordance with Article 7.

2.22 "Employment Commencement Date" means, with respect to an individual, the date on which he first performs an Hour of Service.

2.23 "ERISA" means the Employee Retirement Income Security Act of 1974, as amended at the particular time applicable. A reference to a section of ERISA shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.24 "Five-Percent Owner" means any person who owns (or is considered as owning within the meaning of sections 318 and 416 of the Code) more than 5 percent of the outstanding stock of the Employer or stock possessing more than 5 percent of the total combined voting power of all stock of the Employer.

2.25 "Frozen Cash Election Account" means the separate portion of each Participant's Account which

reflects contributions of the "Elective Percentage" of his "Profit Sharing Allocation" (as those terms were defined in the Old Plan) for Plan Years before 1997, as adjusted in accordance with Article 7.

2.26 "Frozen Vesting Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years before 1997 of that portion of each Participant's "Profit Sharing Allocation" which exceeds his "Elective Percentage" (as those terms were defined in the Old Plan) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.27 (a) "Highly Compensated Employee" with respect to a Plan Year beginning after December 31, 1996, means, as determined under section 414(q) of the Code and the Treasury Regulations thereunder, an individual who, at any time during the Plan Year is an Employee, and who:

(1) during the Plan Year or the preceding twelve month period, was at any time a Five-Percent Owner; or

(2) received Section 415 Compensation from the Employer in excess of $80,000 (as adjusted pursuant to section 414(q)(1) of the Code) during the twelve month period preceding the Plan Year, and, if the Employer so elects, was in the group consisting of the top 20 percent of Employees when ranked on the basis of Section 415 Compensation paid during such preceding twelve month period.

(b) The determination of Highly Compensated Employees shall be made in accordance with the following:

(1) For purposes of determining the number of Employees under (a)(2), the Employees described in section 414(q)(5) of the Code shall be disregarded.

(2) The Employer shall be treated as including any other entities required to be aggregated under section 414 of the Code.

2.28 "Hour of Service" means an hour for which an individual is paid, or entitled to payment, for work for the Employer or an Affiliate.

2.29 "Military Service" means, with respect to a person employed immediately prior thereto by the Employer, the period of time that he spends in the Armed Forces of the United States, or its equivalent recognized pursuant to federal law, provided he returns to the service of the Employer within such period, if any, as is then provided by law for the protection of his re-employment rights, and provided he has not been employed elsewhere before returning to work for the Employer.

2.30 "Non-highly Compensated Employee" means an individual who is not a Highly Compensated Employee and who, at any time during the Plan Year, is an Employee.

2.31 "Normal Retirement Age" means the date on which a Participant has both reached age 65 and completed 5 Vesting Years; provided, however, a Participant's Normal Retirement Age shall in no event be later than the later of the time a Participant attains age 65 or the 5th anniversary of the time the Participant commenced participation in the Plan (or any Predecessor Plan).

2.32 "Old Plan" means The Fifth Third Bancorp Master Profit Sharing Plan as it existed prior to the Effective Date.

2.33 "Participant" means an Employee who satisfies the eligibility requirements of Article 3 and also means a former Employee who has an Account under the Plan. To the extent provided in an applicable Appendix, the term also includes an individual with an Account under the Plan by reason of a plan merger or transfer identified in such Appendix. As provided in an applicable Appendix, certain individuals may be excluded from the term "Participant."

2.34 "Plan" means The Fifth Third Bancorp Master Profit Sharing Plan as set forth in this document, including all Appendices, and, if amended at any time, then as so amended.

2.35 "Plan Assets" means the assets of the Plan at the particular time applicable.

2.36 "Plan Year" means:

(a) For Plan Years beginning prior to January 1, 1999, the calendar year;

(b) For the Plan Year beginning on January 1, 1999, the period commencing on January 1, 1999, and ending on December 30, 1999; and

(c) For Plan Years beginning after December 30, 1999, the 12-month period commencing on December 31 and ending on December 30.

2.37 "Predecessor Plan" means a plan identified as such in an Appendix to this Plan.

2.38 "Profit Sharing Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years after 1996 under Section 4.2(d) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.39 "Profit Sharing Allocation" has the meaning determined under Section 4.2(d).

2.40 "Reemployment Commencement Date" means the first day, after a Severance, on which an individual performs an Hour of Service.

2.41 "Rollover Account" means the separate portion of each Participant's Account which reflects his rollover contributions, if any, as adjusted in accordance with Article 7.

2.42 "Section 401(k) Salary Deferral Account" means the separate portion of each Participant's Account which reflects contributions on behalf of each Participant under Sections 4.1 and 4.3(b), as adjusted in accordance with Article 7.

2.43 (a) "Service" means the sum of the following periods (whether or not continuous), provided that no period of time shall be counted more than once:

(1) each period beginning on an individual's Employment Commencement Date or Reemployment Commencement Date and ending with his next Severance;

(2) any separation from the service of the Employer of 12 months or less;

(3) Military Service;

(4) service taken into account for a particular Participant under a Predecessor Plan. Except as otherwise provided in an Appendix, the following transition rules shall apply with respect to any Participant who has been covered under a Predecessor Plan under which service has been computed on the basis of hours of service during 12-month computation periods. Such an individual shall receive credit for a period of service consisting of:

(A) the number of years of service credited to him before the computation period (determined under the Predecessor Plan) in which the Plan is adopted, plus

(B) the greater of

(i) the period of service that would be credited to him under the elapsed time method under (a) above for his service during the entire computation period in which the adoption occurs or

(ii) service taken into account under the computation periods method as of the date of the adoption.

In addition, the individual shall receive credit for service subsequent to the adoption commencing on the day after the last day of the vesting computation period in which the adoption occurs.

(5) as provided in an applicable Appendix, service (not otherwise taken into account under a Predecessor Plan) for a predecessor employer named in such Appendix, taken into account as provided in such Appendix.

(b) Anything in the Plan to the contrary notwithstanding, in determining an Employee's Service, he shall be entitled to such credit, if any, as is required by federal law.

2.44 "Severance" means, an absence from the employment of the Employer and all Affiliates, beginning on the earliest of death, quit, discharge, retirement or the first anniversary of any other absence (with or without pay).

2.45 "Surviving Spouse" means a Participant's surviving spouse except to the extent that a former spouse is treated as such, for purposes of the Plan, under a qualified domestic relations order as described in section 414(p) of the Code.

2.46 "Trustee" means Fifth Third Bank and its successors and assigns in trust.

2.47 (a) "Vesting Service" means, subject to (b) below, an individual's Service.

(b) To the extent included in (a) above, the following periods shall be disregarded for purposes of determining Vesting Service:

(1) each period, with respect to Fifth Third Bank, prior to January 1, 1982 or, with respect to any other Employer, prior to such Employer's adoption of the Plan, if such service would have been disregarded under the rules of The Fifth Third Bank Profit Sharing Plan or of such other Employer's Predecessor Plan, as the case may be, relating to breaks in service or failure to complete a required period of service within a specified period of time, as such rules were in effect on the applicable date; and

(2) each period prior to a Break in Service if, at the time of incurring such Break in Service, the individual did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if the Break in Service equals or exceeds his Vesting Service before such Break in Service, provided that such Vesting Service before such Break in Service shall be deemed not to include any of such individual's Vesting Service not taken into account hereunder by reason of any prior Breaks in Service.

2.48 "Vesting Years" mean the number of whole years of a Participant's Vesting Service, whether or not such Vesting Service was completed continuously. Nonsuccessive periods of Vesting Service (whether or not consecutive) shall be aggregated on the basis that 365 days of Vesting Service equal a whole Vesting Year.

ARTICLE 3

ELIGIBILITY AND PARTICIPATION

3.1 Eligibility and Participation.

(a) For 401(k) Contributions, After-Tax Contributions and Rollovers. Each Employee shall become a Participant as of the date on which he has credit for at least one Hour of Service.

(b) For Profit Sharing and Matching Contributions. Notwithstanding (a) above, an Employee shall be eligible for profit sharing contributions under Section 4.2 and matching contributions under Section 4.4 only on and after the date on which he has credit for at least one Eligibility Year.

3.2 Participants as of December 30, 2000. Anything in Section 3.1 to the contrary notwithstanding, a person who was a participant in the Old Plan on December 30, 2000 shall be a Participant in the Plan on the Effective Date.

3.3 Reemployment of Former Participant. If a former Participant is reemployed by the Employer, then, provided that he meets the requirements of Section 3.1, he shall become a Participant again as of the date of such reemployment.

ARTICLE 4

CONTRIBUTIONS AND THEIR ALLOCATION

4.1 Compensation Reduction Contributions.

(a) Compensation Reduction. Each Participant may enter into a compensation reduction agreement with his Employer whereby he authorizes his Employer to reduce his Deferrable Compensation or any part thereof, by such percentage or dollar amount prospectively as he shall specify. Such an agreement shall remain in effect until the Participant revokes it or changes it. The Administrator may from time to time establish rules with respect to compensation reduction contributions hereunder, including but not limited to, rules restricting the amount by which compensation may be reduced, rules restricting such contributions to Participants whose pay is paid through the Fifth Third payroll system, and rules respecting the time for filing forms. In accordance with such rules and procedures as the Administrator deems appropriate, the Employer may treat a Participant as having made a compensation reduction election unless and until a

Participant affirmatively elects to revoke or revise such deemed compensation reduction election.

(b) Contribution to the Plan. Subject to the limitations under Article 5 and Section 4.3, the Employer shall so reduce the Participant's Deferrable Compensation and shall contribute to the Plan on behalf of each such Participant an amount equal to the reduction in the Participant's Deferrable Compensation. Such contribution shall be credited to the Participant's Section 401(k) Salary Deferral Account. Such contributions for a Plan Year shall be made as soon as the Employer can reasonably segregate such amounts, but not later than the 15th business day of the month following the month in which such amounts would have otherwise been payable to the Participant.

4.2 Profit Sharing Contributions.

(a) General. For each Plan Year, the Board of Directors of Fifth Third Bancorp shall determine the amount to be contributed to the Plan, subject to Article 5 and this Article 4.

(b) Allocation Among Employers. Each Employer shall contribute under the Plan the total contribution allocable to its Eligible Participants.

(c) Participants Entitled to Receive an Allocation of Employer Contribution. A Participant shall be an "Eligible Participant" and shall be entitled to receive an allocation of the Employer contribution to the Plan under (a) above for a Plan Year if he has credit for at least one Eligibility Year, and, if he:

(1) is in the employment of an Employer on the last day of such Plan Year;

(2) died prior to the termination of his employment and after the first day of the Plan Year and on or before the first day of the immediately succeeding Plan Year;

(3) retired on or after his reaching Normal Retirement Age and after the first day of the Plan Year and on or before the first day of the immediately succeeding Plan Year;

(4) retired on or after his reaching Early Retirement Age and after the first day of the Plan Year and on or before the first day of the immediately succeeding Plan Year;

(5) incurred a Disability and terminated employment as a result thereof after the first day of the Plan Year and on or before the first day of the immediately succeeding Plan Year; or

(6) is on leave of absence at the close of such Plan Year, if he received Annual Compensation from an Employer during such Plan Year.

(d) Allocations.

(1) Profit Sharing Levels. As of the last day of a Plan Year, the Level in which each Eligible Participant falls shall be determined based on the following:

(A) 100% Level. Each Eligible Participant who, as of the last day of the Plan Year, has credit for at least four Vesting Years and each

Eligible Participant who is a "Grandfathered Employee" (as defined below).

(B) 75% Level. Each Eligible Participant who, as of the last day of the Plan Year, has credit for at least three Vesting Years but less than four Vesting Years, and who is not a Grandfathered Employee.

(C) 50% Level. Each Eligible Participant who, as of the last day of the Plan Year, has credit for at least two Vesting Years but less than three Vesting Years, and who is not a Grandfathered Employee.

(D) 25% Level. Each Eligible Participant who, as of the last day of the Plan Year, has credit for at least one Vesting Year but less than two Vesting Years, and who is not a Grandfathered Employee.

For these purposes "Grandfathered Employee" means an Eligible Participant who was an Employee on October 31, 1996 and who, since that date, has not had any separation from the service of the Employer.

If an individual is an Eligible Participant but has credit for less than one Vesting Year as of the last day of the Plan Year and is not a Grandfathered Employee, he shall not be in any Level and he shall not be entitled to a Profit Sharing Allocation for the Plan Year.

Solely for purposes of determining the applicable Level for an Eligible Participant who died during the Plan Year and prior to the termination of his employment, who incurred a Disability and terminated employment as a result thereof during such Plan Year or who is on

a leave of absence at the close of the Plan Year, if he received Annual Compensation from an Employer during such Plan Year, such an Eligible Participant shall be credited with Service through the end of the Plan Year.

Solely for purposes of determining the applicable Level for an Eligible Participant, if such Participant has completed a Vesting Year as of the December 31 immediately following a Plan Year but has not completed a Vesting Year as of the last day of such Plan Year, then the Eligible Participant shall be deemed to have completed a Vesting Year as of the last day of such Plan Year.

(2) Profit Sharing Allocation. As of the last day of a Plan Year, a "Profit Sharing Allocation" shall be determined for each Eligible Participant as follows. Each such Participant's Profit Sharing Allocation shall bear the same ratio to the total amount of the Employer contribution under (a) above for such Plan Year as the "Eligible Annual Compensation" (as defined in (3) below) of such Participant for such Plan Year bears to the total Eligible Annual Compensation of all such Participants for such Plan Year.

(3) Eligible Annual Compensation. Each Eligible Participant's Eligible Annual Compensation shall be expressed as a percentage of his Annual Compensation for the Plan Year based on the Level in which he falls as follows:

100% Level: 100% of his Annual Compensation for the Plan Year

75% Level: 75% of his Annual Compensation for the Plan Year

50% Level: 50% of his Annual Compensation for the Plan Year

25% Level: 25% of his Annual Compensation for the Plan Year

In all events, the $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted) and $125,000 limits on Annual Compensation taken into account in any Plan Year under Section 2.8 shall be applied before applying the above percentages to determine Eligible Annual Compensation.

For Plan Years beginning before December 31, 2001, an Eligible Participant described in Section 4.2(c)(2), (3), (4) or (5) for the Plan Year who has not previously had this provision apply to him, his Eligible Annual Compensation taken into account for the Plan Year shall be increased to an amount which is double the amount otherwise determined. This provision shall have no applicability for Plan Years beginning after December 30, 2001.

For each Plan Year, the Employer shall contribute to the Plan, subject to the limitations of Article 5, for allocation to each such Eligible Participant's Profit Sharing Account, an amount equal to the Profit Sharing Allocation as so determined for him.

4.3 Limitation on Compensation Reduction.

(a) General. To the extent the Administrator determines necessary to satisfy the limitations under (c) or (d) below, or Article 5, the Administrator may reduce the percentage of a Participant's Deferrable Compensation available for compensation reduction pursuant to Section 4.1.

(b) Discretionary Employer Contributions. In the discretion of the Board of Directors of Fifth Third Bancorp, and subject to the limitations under Article 5, the Employers may contribute, for allocation to the Section 401(k) Salary Deferral Account of each Participant who is in the employment of an Employer on the last day of the Plan Year, such percentage as such Board shall determine of the Annual Compensation of each such Participant for such Plan Year. Such contribution for a Plan Year shall be allocated as of the last Accounting Date for the Plan Year and shall be made no later than the end of the period described in section 404(a)(6) of the Code applicable to the taxable year with or within which the particular Plan Year ends.

(c) Limitation on Section 401(k) Contributions.

(1) Prior Year Testing. Effective for Plan Years beginning after December 31, 1996, the Actual Deferral Percentage for any Plan Year for Participants who are Highly Compensated Employees shall not exceed the greater of:

(A) 1.25 times the Actual Deferral Percentage for the preceding Plan Year for all the Participants who were Non-highly Compensated Employees or

(B) the lesser of:

(i) 2 times the Actual Deferral Percentage for the preceding Plan Year for the Participants who were Non-highly Compensated Employees, provided that the Actual Deferral Percentage for the Participants who are Highly

Compensated Employees shall not exceed the Actual Deferral Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees by more than 2 percentage points; or

(ii) such amount as the Secretary of Treasury may prescribe to prevent multiple use of this alternative limitation with respect to any Highly Compensated Employee for Plan Years beginning before January 1, 2002. In no event, however, shall the multiple use of this alternative limitation as between the Employer matching contributions under Section 4.4) and the remainder of the Plan be prohibited.

(2) Special Rules for Early Participation. If the Employer elects to apply the special rule of section 410(b)(4)(B) of the Code in determining that the Section 401(k) feature satisfies the coverage rules of section 410(b)(1) of the Code, then the following special rules apply. In such a case, for testing purposes, the Plan shall be treated as two separate plans: one benefitting the Employees who have satisfied the lower minimum age and service conditions of the Plan but not the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan A"); and one benefitting Employees who have satisfied the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan B"). The testing in this Section 4.3(c) shall be applied as follows:

(A) For Plan Years beginning before January 1, 1999, and at the election of the Employer, for Plan Years beginning after December 31, 1998, the testing shall be applied separately to

Component Plan A and Component Plan B. In this regard, the Actual Deferral Percentages and Actual Contribution Percentages shall be determined separately for each such Component Plan.

(B) For Plan Years beginning after December 31, 1998, at the election of the Employer, in lieu of the testing provided in (A) above, the testing shall be applied solely to Component Plan B (and not Component Plan A); provided however any Highly Compensated Employees in Component Plan A must be included in the Actual Deferral Percentage and testing of Component Plan B.

This provision shall be administered in accordance with rules and regulations promulgated by the Secretary of Treasury or its delegate.

(d) Adjusted $10,500 Annual Limit. In no event shall the amount of a Participant's compensation reduction under Section 4.1(a) (and under all other plans, contracts or arrangements of the Employer which allow elective deferrals within the meaning of section 402(g)(3) of the Code) during a calendar year exceed the dollar limitation contained in section 402(g) of the Code in effect for the taxable year, except to the extent permitted in section 414(v) of the Code.

4.4 Employer Matching Contributions to Employer Matching Accounts.

(a) Pay Period Match. The Employer shall make matching contributions to the Employer Matching Accounts of each Participant who, after he has credit for at least one Eligibility Year, has compensation reduction contributions made on his behalf under Section 4.1 for any pay period. Only those

compensation reduction contributions made on the Participant's behalf under Section 4.1 for any pay period after he has credit for one Eligibility Year shall be eligible for the matching contributions described below. The amount of such matching contributions shall be calculated by reference to so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for such pay period.

For each pay period ending prior to a Participant's completion of 10 Vesting Years, the Employer matching contribution shall equal twenty-five percent (25%) of so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for such pay period.

For each pay period ending on or after a Participant's completion of 10 Vesting Years but prior to his completion of 20 Vesting Years, the Employer matching contribution shall equal fifty percent (50%) of so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for such pay period.

For each pay period ending on or after a Participant's completion of 20 Vesting Years, the Employer matching contribution shall equal seventy-five percent (75%) of so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed six percent (6%) of the Participant's

Deferrable Compensation otherwise payable for such pay period.

In the event the rate of matching contribution (determined after corrective distribution of elective deferrals under sections 401(k) or (m) or 402(g) of the Code) is determined by the Administrator to be discriminatory in favor of one or more Highly Compensated Employees, the Administrator shall forfeit that part of such matching contribution (as adjusted in accordance with Article 7) as is necessary to make such rate nondiscriminatory (and in such a case the contributions shall be disregarded under the Plan's provisions relative to sections, 401(k)(3) and 401(m)(2) of the Code).

For Plan Years beginning after December 30, 2001, a Participant who is otherwise eligible for the pay period match as described above but who is required to stop his compensation reduction contribution by reason of having reached the adjusted $10,500 limit under Section 4.3(d) above (and section 402(g) of the Code) nevertheless may qualify for the subsequent pay period matches in the Plan Year by making voluntary after-tax contributions out of his Deferrable Compensation. When a Participant reaches such limit, the Administrator may treat his 401(k) compensation reduction election as an election to make voluntary after-tax contributions unless and until the Participant revokes or revises such deemed election. Such match shall be calculated and administered under this Section 4.4(a) by treating the Participant's voluntary after-tax contributions made from his Deferrable Compensation after having reached such limit as if they were

compensation reduction contributions under Section 4.1.

(b) Plan Year Match.

(1) General. For Plan Years beginning before December 31, 2001, the Employer shall make matching contributions to the Employer Matching Accounts of Participants eligible under (2) below to receive such match in the amount (if any) determined under (3) below. The Plan Year match described in this Subsection (b) shall not be made for Plan Years beginning after December 30, 2001.

(2) Participants Eligible for Plan Year Match. A Participant shall be eligible for the Plan Year match if he meets all of the following:

(A) he had credit for one Eligibility Year on or before the first day of the Plan Year; and

(B) he is an Eligible Participant for the Plan Year; and

(C) he made compensation reduction contributions in excess of six percent (6%) of his Deferrable Compensation otherwise payable for one or more pay periods during the Plan Year; and

(D) either

(i) he ceased making compensation reduction contributions during the Plan Year by reason of the limit in section 402(g) of the Code (and Section 4.3(d) of the Plan) and had Deferrable Compensation paid after reaching such limit; or

(ii) the Administrator limited the amount of Deferrable Compensation qualifying for the pay period match under Section 4.4(a) above by reason of applying the compensation limitation imposed under section 401(a)(17) of the Code and Section 2.14 of the Plan in a manner that would not have so limited the Deferrable Compensation had the limit been applied solely on a Plan Year basis to total Deferrable Compensation for the Plan Year.

(3) Amount of Plan Year Match. The amount of such matching contributions shall be calculated by reference to the Participant's compensation reduction contributions under Section 4.1 for the Plan Year. The amount of such matching contributions shall be calculated by reference to so much of the Participant's compensation reduction contributions for the Plan Year as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for the Plan Year, offset by the pay period matches allocable to the Participant for the Plan Year.

For an Eligible Participant who, as of the last day of the Plan Year, has credit for less than 10 Vesting Years, the Plan Year match (if any) shall equal twenty-five percent (25%) of so much of the Participant's compensation reduction contributions for the Plan Year as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for the Plan Year, reduced by the amount of the pay period matching contributions allocable to the Participant for pay periods in the Plan Year under Section 4.4(a) above.

For an Eligible Participant who, as of the last day of the Plan Year, has credit for at least 10 Vesting Years but less than 20 Vesting Years, the Plan Year match (if any) shall equal fifty percent (50%) of so much of the Participant's compensation reduction contributions for the Plan Year as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for the Plan Year, reduced by the amount of the pay period matching contributions allocable to the Participant for pay periods in the Plan Year under Section 4.4(a) above.

For an Eligible Participant who, as of the last day of the Plan Year, has credit for at least 20 Vesting Years, the Plan Year match (if any) shall equal seventy-five percent (75%) of so much of the Participant's compensation reduction contributions for the Plan Year as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for the Plan Year, reduced by the amount of the pay period matching contributions allocable to the Participant for pay periods in the Plan Year under Section 4.4(a) above.

In the event the rate of matching contribution (determined after corrective distribution of elective deferrals under sections 401(k) or (m) or 402(g) of the Code) is determined by the Administrator to be discriminatory in favor of one or more Highly Compensated Employees, the Administrator shall forfeit that part of such matching contribution (as adjusted in accordance with Article 7) as is necessary to make such rate nondiscriminatory.

Solely for purposes of determining the Vesting Years, for an eligible Participant, if such Participant has

completed a Vesting Year as of the December 31 immediately following a Plan Year but has not completed a Vesting Year as of the last day of such Plan Year, then the eligible Participant shall be deemed to have completed a Vesting Year as of the last day of such Plan Year.

(c) Limitation on Employer Matching Contributions to Employer Matching Accounts.

(1) Prior Year Testing. Effective for Plan Years beginning after December 31, 1996, the Actual Contribution Percentage for any Plan Year for Participants who are Highly Compensated Employees and who have credit for at least one Eligibility Year shall not exceed the greater of:

(A) 1.25 times the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees and who had credit for at least one Eligibility Year (in the case of Employees whose Employment Commencement Date is on or after November 1, 1996) ; or

(B) the lesser of:

(i) 2 times the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees and who had credit for at least one Eligibility Year provided that the Actual Contribution Percentage for the Participants who are Highly Compensated Employees and who had credit for at least one Eligibility Year shall not exceed the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated

Employees and who had credit for at least one Eligibility Year by more than 2 percentage points; or

(ii) such amount as the Secretary of Treasury may prescribe to prevent multiple use of this alternative limitation with respect to any Highly Compensated Employee for Plan Years beginning before January 1, 2002. In no event, however, shall the multiple use of this alternative limitation as between the Employer matching contributions under Section 4.4 and the remainder of the Plan be prohibited.

(2) Special Rules for Early Participation. If the Employer elects to apply the special rule of section 410(b)(4)(B) of the Code in determining that the Employer matching feature satisfies the coverage rules of section 410(b)(1) of the Code, then the following special rules apply. In such a case, for testing purposes, the Plan shall be treated as two separate plans: one benefitting the Employees who have satisfied the lower minimum age and service conditions of the Plan but not the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan A"); and one benefitting Employees who have satisfied the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan B"). The testing in this Section 4.4(c) shall be applied as follows:

(A) For Plan Years beginning before January 1, 1999, and at the election of the Employer, for Plan Years beginning after December 31, 1998, the testing shall be applied separately to Component Plan A and Component Plan B. In this regard, the Actual Deferral Percentages and Actual

Contribution Percentages shall be determined separately for each such Component Plan.

(B) For Plan Years beginning after December 31, 1998, at the election of the Employer, in lieu of the testing as provided in (A) above, the testing shall be applied solely to Component Plan B (and not Component Plan A); provided however any Highly Compensated Employees in Component Plan A must be included in the Actual Deferral Percentage and testing of Component Plan B.

This provision shall be administered in accordance with rules and regulations promulgated by the Secretary of Treasury or its delegate.

(d) Time for Matches. Contributions under this Section 4.4 for a Plan Year shall be made no later than the end of the Plan Year following the Plan Year to which the contributions relate (or such later time as may be permitted by Treasury Regulations).

4.5 Voluntary After-Tax Participant Contributions.

(a) General. Each Participant may make voluntary after-tax contributions in cash to the Plan. A Participant's voluntary contributions to the Plan shall be subject to the limitations of Article 5, (b) below and such other limitations as the Administrator may establish from time to time. Such contributions shall be made in accordance with such rules and limitations as are prescribed by the Administrator. Subject to such rules, a Participant may discontinue or resume such contributions or change the rate, if any, thereof. Voluntary contributions by Participants shall not be treated as qualified voluntary employee contributions under section 219 of the Code. A Participant's

voluntary after-tax contributions shall be credited to his After-Tax Account as soon as administratively feasible following the Trustee's receipt thereof.

(b) Limitation.

(1) Prior Year Testing. Effective for Plan Years beginning after December 31, 1996, the Actual Contribution Percentage for any Plan Year for Participants who are Highly Compensated Employees shall not exceed the greater of:

(A) 1.25 times the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees; or

(B) the lesser of:

(i) 2 times the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees, provided that the Actual Contribution Percentage for the Highly Compensated Employees shall not exceed the Actual Contribution Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees by more than 2 percentage points; or

(ii) such amount as the Secretary of the Treasury may prescribe to prevent multiple use of this alternative limitation with respect to any Highly Compensated Employee for Plan Years beginning before January 1, 2002. In no event, however, shall the multiple use of this alternative limitation as between the Employer matching

contribution under Section 4.4 and the remainder of the Plan be prohibited.

To the extent necessary to avoid a violation of this limitation, compensation reduction contributions under Section 4.1 and that part of the Elective Percentage of a Participant's Profit Sharing Allocation which is paid over to the Trustee shall be treated as contributions taken into account in determining the Actual Contribution Percentage; but only if, and to the extent, the limitations in Section 4.3(c) would not be violated if such amount were not taken into account in determining the Actual Deferral Percentage. The determination and treatment of the separate ratios for each Participant in determining the Actual Contribution Percentage shall satisfy such other requirements as may be prescribed by the Secretary of Treasury.

(2) Special Rules for Early Participation. If the Employer elects to apply the special rule of section 410(b)(4)(B) of the Code in determining that the voluntary after-tax contribution feature satisfies the coverage rules of section 410(b)(1) of the Code, then the following special rules apply. In such a case, for testing purposes, the Plan shall be treated as two separate plans: one benefitting the Employees who have satisfied the lower minimum age and service conditions of the Plan but not the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan A"); and one benefitting Employees who have satisfied the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan B"). The testing in this Section 4.5(b) shall be applied as follows:

(A) For Plan Years beginning before January 1, 1999, and at the election of the Employer, for Plan Years beginning after December 31, 1998, the testing shall be applied separately to Component Plan A and Component Plan B. In this regard, the Actual Deferral Percentages and Actual Contribution Percentages shall be determined separately for each such Component Plan.

(B) For Plan Years beginning after December 31, 1998, at the election of the Employer, in lieu of the testing as provided in (A) above, the testing shall be applied solely to Component Plan B (and not Component Plan A); provided however any Highly Compensated Employees in Component Plan A must be included in the Actual Deferral Percentage and testing of Component Plan B.

This provision shall be administered in accordance with rules and regulations promulgated by the Secretary of Treasury or its delegate.

4.6 Rollover Contributions. A Participant, while in the employ of the Employer, may contribute to the Plan money and/or other property acceptable to the Trustee that qualifies for such a rollover under the provisions of section 402(c) or 403(a)(4) of the Code or that qualifies as a rollover contribution under section 408(d)(3) of the Code; provided however, no amounts constituting accumulated deductible employee contributions, as defined in section 72(o)(5) of the Code, after-tax employee contributions or traditional Individual Retirement Account (IRA) contributions may be so contributed. Any rollover contribution shall be credited to such Participant's Rollover Account as soon as administratively feasible following the

Trustee's receipt thereof. If any amount received as a rollover contribution is determined not to qualify for a rollover, then such amount (adjusted for any gain or loss) shall be returned to the Participant as soon as practical.

4.7 Treatment of Excess Contributions.

(a) Excess Elective Deferrals.

(1) Participant Election. If amounts are includible in a Participant's gross income under section 402(g) of the Code for a taxable year of the Participant, the Participant may elect to receive a distribution from his Section 401(k) Salary Deferral Account in an amount up to the sum (or difference) of:

(A) the lesser of:

(i) the amount includible in his gross income under section 402(g) of the Code for the taxable year; or

(ii) the sum of his compensation reduction under Section 4.1(a) for the taxable year plus; (or minus)

(B) the income (or loss) allocable to the amount determined under (A) determined in accordance with Treasury Regulations.

(2) Procedure. An election under (1) above shall be made in writing, signed by the Participant, on such form as the Administrator shall direct and shall be effective only if received by the Administrator no later than the first March 1st following the close of the Participant's taxable year to which the election relates. A Participant who has

exceeded the limits of Section 4.3(d) shall be deemed to have made an election hereunder to the extent of such excess.

(3) Distribution. Any other provisions of the Plan to the contrary notwithstanding, the amount determined under (1) if properly elected under (2) shall be paid to the Participant as a lump sum no later than the first April 15th following the close of the Participant's taxable year to which the election relates.

(4) Effect on Other Provisions. Except to the extent provided by the Secretary of the Treasury or his delegate, distributions hereunder shall be taken into account under Sections 4.3(c) and 4.5(b).

(b) Excess Section 401(k) Deferrals.

(1) Excess Actual Deferral Percentage. Effective for Plan Years beginning after December 31, 1996, if the Actual Deferral Percentage for a Plan Year for the Participants who are Highly Compensated Employees exceeds the maximum amount allowable under Section 4.3(c), then the Administrator shall determine the amount to be distributed, and the Highly Compensated Employees subject to receiving a distribution, in accordance with the Code and applicable Treasury Regulations.

(2) Distribution. Any other provisions of the Plan to the contrary notwithstanding, the Administrator shall distribute the amount determined under (1) above to each Highly Compensated Employee determined under (1) above as a lump sum cash distribution no later than the last day of the following Plan Year.

(3) Effect on Other Provisions. If distributions are made in accordance with this Section 4.7(b) with respect to a Plan Year, then the limitations of Section 4.3(c) shall be deemed satisfied for the Plan Year. Except to the extent provided by the Secretary of Treasury, distributions hereunder shall be taken into account under Article 5.

(c) Excess Voluntary After-Tax Participant Contributions.

(1) Excess Actual Contribution Percentage. Effective for Plan Years beginning after December 31, 1996, if the Actual Contribution Percentage applicable to voluntary after-tax Participant contributions for a Plan Year for the Participants who are Highly Compensated Employees exceeds the maximum amount allowable under Section 4.5 (after application of (a) and (b) above), then the Administrator shall determine the amount to be distributed, and the Highly Compensated Employees subject to receiving a distribution, in accordance with the Code and applicable Treasury Regulations.

(2) Distribution. Any other provisions of the Plan to the contrary notwithstanding, the Administrator shall distribute the amount determined under (1) above to each Highly Compensated Employee determined under (1) above as a lump sum cash distribution no later than the last day of the following Plan Year.

(3) Effect on Other Provisions. If distributions are made in accordance with this Section 4.7 with respect to a Plan Year, then the limitations of Section 4.5(b) shall be deemed satisfied for the Plan

Year. Except to the extent provided by the Secretary of Treasury, distributions hereunder shall be taken into account under Article 5 of the Plan.

(d) Excess Matching Contributions.

(1) Excess Actual Contribution Percentage. Effective for Plan Years beginning after December 31, 1996, if the Actual Contribution Percentage applicable to Employer matching contributions for a Plan Year for the Participants who are Highly Compensated Employees exceeds the maximum amount allowable under Section 4.4(c), then the Administrator shall determine the amount to be distributed, and the Highly Compensated Employees subject to receiving a distribution, in accordance with the Code and applicable Treasury Regulations.

(2) Distribution. Any other provisions of the Plan to the contrary notwithstanding, the Administrator shall distribute the amount determined under (1) above to each Highly Compensated Employee determined under (1) above as a lump sum cash distribution no later than the last day of the following Plan Year.

(3) Effect on Other Provisions. If distributions are made in accordance with this Section 4.7 with respect to a Plan Year, then the limitations of Section 4.4(c) shall be deemed satisfied for the Plan Year. Except to the extent provided by the Secretary of Treasury, distributions hereunder shall be taken into account under Article 5 of the Plan.

4.8 Return of Employer Contributions.

(a) Mistake of Fact. If a contribution by an Employer to the Plan is made by reason of a mistake of fact, then, subject to (c) below, such contribution may be returned to the contributing Employer within 1 year after the payment of such contribution.

(b) Deductibility. Employer contributions to the Plan are conditioned upon the deductibility of such contributions under section 404 of the Code, and, subject to (d) below, such contributions (to the extent disallowed) may be returned to the contributing Employer within 1 year after the disallowance of the deduction.

(c) Limitation on Return. The amount of the contribution which may be returned to an Employer under paragraph (a) or (c) above shall be limited to the excess of the amount contributed over the amount that would have been contributed had there not occurred a mistake of fact or a mistake in determining the deduction. Earnings attributable to such excess may not be returned to an Employer, but losses attributable thereto must reduce the amount to be so returned. Furthermore, the amount of the contribution which may be returned shall be limited so as not to cause the balance to the credit of a Participant's Account to be reduced to less than the balance which would have been credited to his Account had such contribution not been made.

4.9 Minimum Employer Contribution.

(a) General. For each Plan Year, the Employer shall make contributions to the Plan in the form of employer contributions at least equal to a

specified dollar amount, on behalf of those individuals who are entitled to an allocation under Section 4.10. Such amount (the "Minimum Employer Contribution") shall be determined by the Board of Directors of Fifth Third Bancorp, or its delegate, by appropriate action on or before the last day of the Employer's taxable year that ends within such Plan Year.

(b) Payment. Subject to Article 5, the Minimum Employer Contribution for a Plan Year shall be paid by the Employer in one or more installments without interest. The Minimum Employer Contribution shall be deemed to be satisfied for the Plan Year as soon as the total of "employer contributions" for the Plan Year equals the amount of the Minimum Employer Contribution. For purposes of this Section 4.9, "employer contributions" means employer contributions under Section 404 of the Code, including, but not limited to, compensation reduction contributions under Section 4.1, Employer matching contributions under Section 4.4 and profit sharing contributions under Section 4.2. For purposes of deducting the Minimum Employer Contribution, the Employer shall make the contribution not later than the time prescribed by the Code for filing the Employer's Federal income tax return including extensions, for its taxable year that ends within such Plan Year. Notwithstanding any provision of the Plan to the contrary, the Minimum Employer Contribution made to the Plan by the Employer shall not revert to, or be returned to, the Employer.

(c) "Minimum Employer Contribution" means the contributions made by the Employer in accordance with the provisions of this Section 4.9.

4.10 Allocation of Minimum Employer Contribution.

(a) Subject to Article 5, the Minimum Employer Contribution for the Plan Year shall be allocated as follows:

(1) First, the Minimum Employer Contribution for the Plan Year shall be allocated during the Plan Year to each individual who is a Participant on the first day of the Plan Year as compensation reduction contributions pursuant to Section 4.1 and as Employer matching contributions pursuant to Section 4.4. These allocations will be made to each such Participant's Section 401(k) Salary Deferral Account and Employer Matching Account, respectively.

(2) Second, the balance of the Minimum Employer Contribution remaining after the allocation in (1) above shall be allocated as a profit sharing contribution to each Eligible Participant as determined under Section 4.2(c), in the manner provided under Section 4.2(c). Contributions made pursuant to this Subsection (a)(2) shall be allocated to such Participant's Profit Sharing Account.

(3) Third, the balance of the Minimum Employer Contribution remaining after the allocation under (1) and (2) above shall be allocated as a nonelective contribution to each Non-Highly Compensated Employee who is a Participant on the first day of the Plan Year, in the ratio that such Participant's Deferrable Compensation for the Plan Year bears to the Deferrable Compensation for the Plan Year of all such Participants. Contributions made pursuant to this Subsection (a)(3) shall be allocated to

such Participant's Employer Matching Account and are distributable only in accordance with the distribution provisions applicable to Employer matching contributions. Contributions made pursuant to this Subsection (a)(3) shall be subject to the vesting schedule set forth in Section 6.1(f)(2)(A). Such contribution shall be invested under the Plan in the manner designated by such Participant.

(b) Each installment of the Minimum Employer Contribution shall be held in a contribution suspense account unless, or until, allocated on or before the end of the Plan Year in accordance with this Section 4.10. Such suspense account shall not participate in the allocation of investment gains, losses, income and deductions of Fifth Third Profit Sharing Trust Fund as a whole, but shall be invested separately, as directed by the Employer, and all gains, losses, income and deductions attributable to such investment shall be applied to reduce Plan expenses, and thereafter, to reduce employer contributions.

(c) The Minimum Employer Contribution allocated to the Participant's Employer Matching Account pursuant to Subsection (a)(1) shall be treated in the same manner as Employer matching contributions for all purposes of the Plan.

(d) Notwithstanding any other provision of the Plan to the contrary, any allocation of compensation reduction contributions to a Participant's Section 401(k) Salary Deferral Account shall be made under either Section 4.1 or this Section 4.10, but not both Sections; any allocation of an Employer matching contribution shall be made under either Section 4.4 or this Section 4.10, as appropriate, but not both Sections;

and any allocation of a profit sharing contribution shall be made under either Section 4.2 or this Section 4.10, as appropriate, but not both Sections.

ARTICLE 5

LIMITATIONS ON ANNUAL ADDITIONS

5.1 Definitions. For purposes of this Article 5, the following terms shall have the following meanings:

(a) "Annual Addition" means, with respect to the Plan, any other Defined Contribution Plan in which a Participant participates or has participated, and any account described in (4) or (5) below, the sum, for the Limitation Year, of:

(1) all employer contributions (other than amounts restored in accordance with section 411(a)(3)(D) or 411(a)(7)(C) of the Code) allocated to his account;

(2) all forfeitures allocated to his account;

(3) 100% of his own contributions (other than rollover contributions, repayments of loans or of amounts described in section 411(a)(7)(B) of the Code in accordance with the provisions of section 411(a)(7)(C) of the Code and repayments of amounts described in section 411(a)(3)(D) of the Code, direct transfers between qualified plans);

(4) amounts allocated to an individual medical benefit account, as defined in section 415(1)(2) of the Code, which is part of a pension or annuity plan maintained by the Employer or an Affiliate; and

(5) amounts derived from contributions paid or accrued in taxable years ending after such date, which are attributable to post-retirement medical benefits allocated to the separate account of a key employee, as defined in section 419A(d)(3) of the Code, under a welfare benefits fund, as defined in section 419(e) of the Code, maintained by the Employer or an Affiliate.

A Participant's Annual Addition shall include such other amounts as the Commissioner of Internal Revenue properly determines. An Annual Addition shall be deemed credited to a Participant's account with respect to an applicable Limitation Year if it is allocated to his account under the terms of such plan as of any date within such applicable Limitation Year; provided however, such amount must be actually contributed within the time limit prescribed by applicable Treasury Regulations.

(b) (1) "Defined Contribution Plan" means each of the following (whether or not terminated) maintained by the Employer or an Affiliate:

(A) a plan that is qualified under section 401 of the Code and that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account;

(B) a Participant's contributions to a Defined Benefit Plan; and

(C) contributions by the Employer or an Affiliate to a simplified employee pension (as defined in section 408(k) of the Code).

(2) With respect to any Participant who is in control of the Employer within the meaning of section 414(b) or (c) of the Code, as modified by section 415(h) of the Code, the term "Defined Contribution Plan" includes an annuity contract described in section 403(b) of the Code.

(c) "Limitation Year" means the calendar year or any other 12-consecutive-month period adopted pursuant to written resolution.

(d) "Section 415 Compensation" means the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code). Effective for Limitations Years beginning after December 31, 1997, the term includes any elective deferrals (as defined in section 402(g)(3) of the Code) and any amount which is contributed or deferred at the election of the Employee and which is not includible in the Employee's gross income by reason of section 125 or 457 of the Code. Effective for Limitation Years beginning after December 31, 2000, the term also includes elective amounts that are not includible in the gross income of the Employee by reason of section

132(f)(4) of the Code. Section 415 Compensation actually paid or made available to a Participant within a Limitation Year (including, at the election of the Employer, amounts earned but not paid in a Limitation Year because of the timing of pay periods and pay days if these amounts are paid during the first few weeks of the next Limitation Year, the amounts are included on a uniform and consistent basis with respect to all similarly situated Employees and no amount is included in more than one Limitation Year) shall be used.

5.2 Limitation on Annual Addition.

(a) Limitation. Subject to Section 5.3, and subject to Treasury Regulations covering the aggregation during a Limitation Year of previously unaggregated plans, the Annual Addition with respect to a Participant for any Limitation Year to which section 415 of the Code applies shall not exceed the lesser of:

(1) $30,000 ($40,000 for Limitation Years beginning after December 31, 2001) (as adjusted under section 415(d) of the Code), or

(2) 25 percent (100 percent for Limitation Years beginning after December 31, 2001) of such Participant's Section 415 Compensation for such Limitation Year.

The limitation in (2) above shall not apply with respect to any contributions for medical benefits (within the meaning of section 401(h) or 419A(f)(2) of the Code) which are otherwise treated as an Annual Addition under section 415(1) or 419A(d)(2) of the Code. In

addition, the limitations shall not apply to contributions under section 414(v) of the Code.

(b) Treatment of Excess Annual Additions.

(1) General. If, as a result of the allocation of forfeitures, a reasonable error in estimating a Participant's annual Section 415 Compensation, a reasonable error in determining the amount of elective deferrals (within the meaning of section 402(g)(3) of the Code) that may be made within the limits of section 415 of the Code, or under other facts and circumstances which the Commissioner of Internal Revenue finds justify the availability of the rules set forth herein, the Annual Addition under the Plan for a particular Participant would cause the limitations of (a) above applicable to that Participant for the Limitation Year to be exceeded, then:

(A) elective deferrals (within the meaning of section 402(g) of the Code) and employee contributions to the extent matching contributions were not made with respect thereto together with any gains allocated thereto shall be returned to the extent that the return would reduce the excess amount (and in such a case the contributions shall be disregarded under the Plan's provisions relative to sections 402(g), 401(k)(3) and 401(m)(2) of the Code);

(B) elective deferrals (within the meaning of section 402(g) of the Code) and employee contributions together with any gains allocated thereto shall be returned to the extent that the return and the forfeiture of any matching contributions made with respect to such contributions would reduce the excess amount (and in such a case the contributions shall be

disregarded under the Plan's provisions relative to sections 402(g), 401(k)(3) and 401(m)(2) of the Code);

(C) any excess remaining after the application of (A) and (B) above shall be used to reduce Employer contributions (including any allocation of forfeitures) for the next Limitation Year (and succeeding Limitation Years, as necessary) for that Participant if that Participant is covered by the Plan as of the end of the Limitation Year; and

(D) if that Participant is not covered by the Plan as of the end of the Limitation Year, then the excess amounts shall be held unallocated in a suspense account for the Limitation Year, and allocated and reallocated in the next Limitation Year (and succeeding Limitation Years, as necessary) to all of the remaining Participants' accounts, pursuant to the Plan's formula for allocating Employer contributions, and shall be used to reduce Employer contributions for the next Limitation Year (and succeeding Limitation Years, as necessary) for all of the remaining Participants.

(2) Allocation of Excess Among Plans. If Annual Additions are allocated to a Participant's account under more than one plan, then any excess shall be deemed to consist of the following (in the following order of priority):

(A) first, employee contributions under any plan of the Employer;

(B) second, elective deferrals (within the meaning of section 402(g)(3) of the Code) under any plan of the Employer to the extent matching contributions were not made with respect thereto;

(C) third, elective deferrals (within the meaning of section 402(g)(3) of the Code) under any plan of the Employer proportionate with matching contributions made with respect thereto;

(D) fourth, any other allocations under this Plan;

(E) fifth, any other allocations under all the Employer's other defined contribution plans except under any separate employee stock ownership plan; and

(F) sixth, any other allocations under any separate employee stock ownership plan of the Employer's.

Any excess attributed to this Plan under the foregoing shall be disposed of in the manner described in Section 5.2(b)(1) above.

(3) Suspense Account. If a suspense account is in existence, then, anything in the Plan to the contrary notwithstanding:

(A) no further Employer or employee contributions which would constitute an Annual Addition may be made until all amounts in the suspense account are first allocated and reallocated;

(B) investment gains and losses and other income shall not be allocated to the suspense account; and

(C) upon termination of the Plan, amounts which are held in the suspense account, and which (because of the limitations of (a) above) cannot

be allocated to Participants' accounts, shall revert to the Employer.

5.3 Limitation in Case of Defined Benefit Plan and Defined Contribution Plan for the Same Employee. In any case in which a Participant has at any time participated in one or more Defined Benefit Plans, the sum of the "Defined Benefit Plan Fraction" and the "Defined Contribution Plan Fraction," for any Limitation Year beginning before January 1, 2000, may not exceed 1.0, subject to Treasury Regulations covering the aggregation during a Limitation Year of previously unaggregated plans. If such sum would exceed 1.0, for any Limitation Year beginning before January 1, 2000, then the Annual Additions to the Plan shall be reduced only to the extent that such excess is not eliminated by reductions in the accrual of Defined Benefit Plan benefits. For these purposes, "Defined Benefit Plan Faction" and "Defined Contribution Plan Fraction" shall have the meaning provided in the Old Plan.

ARTICLE 6

VESTING AND FORFEITURES

6.1 Vesting Provisions.

(a) After-Tax Account. A Participant's rights to his After-Tax Account shall be nonforfeitable at all times.

(b) Rollover Account. A Participant's rights to his Rollover Account shall be nonforfeitable at all times.

(c) Frozen Cash Election Account and Section 401(k) Salary Deferral Account. A Participant's rights to his Frozen Cash Election Account and Section 401(k) Salary Deferral Account shall be nonforfeitable at all times.

(d) Profit Sharing Account. Subject to Section 6.1(f)(6) below, a Participant's rights to his Profit Sharing Account shall be nonforfeitable at all times.

(e) Employer Matching Account. Subject to Section 6.1(f)(6) below, a Participant's rights to his Employer Matching Account shall be nonforfeitable at all times.

(f) Frozen Vesting Account.

(1) At Normal Retirement Age. Upon and after a Participant's attainment of Normal Retirement Age, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his Frozen Vesting Account.

(2) Prior to Normal Retirement Age.

(A) Vesting Schedule. Subject to (6) below, a Participant who has credit for any Service on or after the Effective Date shall have a nonforfeitable right to a percentage of his Frozen Vesting Account on the basis of the number of Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 3	0%
3	30%
4	40%
5	60%
6	80%
7 or more	100%

If a Participant is reemployed after incurring a forfeiture, any balance remaining in his Frozen Vesting Account at the time of such reemployment shall be separately accounted for, shall be nonforfeitable, and shall not be subject to the above vesting schedule.

A Participant who does not have credit for any Service on or after the Effective Date shall have the vested percentage of his Frozen Vesting Account determined under the applicable provisions of the Old Plan.

(B) Death or Disability. Anything in (A) above to the contrary notwithstanding, but subject to (6) below, if a Participant's employment by the Employer terminates because of his death or incurrence of a Disability, then his Frozen Vesting Account shall be fully vested.

(C) Changes in Vesting Schedule. Anything in the foregoing to the contrary notwithstanding, if the adoption of the Plan or of an amendment thereto results in a change in any vesting schedule, then each Participant shall have a nonforfeitable right to a percentage of the particular Account to which such vesting schedule relates that is no less than the vested percentage in such Account computed on the date immediately prior to the later of

the date of such adoption or the effective date of such adoption, and without regard to such adoption.

(3) Forfeiture for Break in Service. If a Participant incurs a Break in Service, then his forfeitable interest (as of such incurrence) in his Frozen Vesting Account shall be forfeited.

(4) Effect of Certain Distributions. Except as otherwise provided in paragraph (5) or (7) below, if a Participant who is not fully vested in his Frozen Vesting Account receives an amount therefrom prior to his incurrence of a Break in Service, then, at any relevant time after such distribution and prior to his incurrence of a Break in Service, the vested portion ("X") of his Frozen Vesting Account after the distribution ("AB") shall be an amount determined by the formula

$$X = P (AB + D) - D$$

where "P" is the vested percentage at the relevant time and "D" is the amount of the distribution.

(5) Effect of Cash-Out Distributions.

(A) Forfeiture. If a Participant, who is not fully vested in his Frozen Vesting Account, terminates service and receives a distribution of the present value of his entire nonforfeitable interest, then his forfeitable interest therein shall be forfeited immediately; provided however, if the present value of the portion of the distribution attributable to Employer contributions exceeds $5,000, then there shall be no forfeiture hereunder unless the Participant has voluntarily requested to receive such distribution.

(B) Restoration. Any amount that a Participant forfeited under (A) above shall be restored, unadjusted for any gains or losses, if such Participant resumes employment with the Employer covered by the Plan and if he repays to the Plan the full amount of such distribution before the earlier of:

(i) his incurrence of a Break in Service, or

(ii) the end of the five-year period beginning with his resumption of employment with an Employer covered by the Plan.

(C) Source of Restoration. Any restoration under (B) above shall be made from available forfeitures before any other allocation thereof, and, if such forfeitures are insufficient, then the Employer shall contribute the difference.

(D) Special Rule. A Participant, who has no vested interest in his Frozen Vesting Account and no After-Tax Account, Frozen Cash Election Account, Rollover Account, Section 401(k) Salary Deferral Account, Profit Sharing Account or Employer Matching Account and who terminates service, shall be treated for purposes of (A) above as if he had received a distribution of the present value of his entire nonforfeitable interest as of the date of his termination of service. Such a Participant who resumes employment with the Employer covered by the Plan before he incurs a Break in Service, shall be treated under (B) above as if he had repaid to the Plan the full amount of that distribution as of the date of his resumption of employment.

(6) Forfeiture for Dishonesty or Competition with the Employer.

(A) If, under rules uniformly and consistently applied, in a nondiscriminatory manner, to all Participants under similar circumstances, any of the events described in (B) below occurs with respect to a Participant described in (C) below, then all amounts which are then standing to the credit of his Frozen Vesting Account, Employer Matching Account and Profit Sharing Account or which are attributable to such Accounts and are then to be, or are then being, used to fund or pay the distribution under the Plan to him or his Beneficiary, as the case may be, shall not be distributable so long as (C) below applies to him and shall be treated as a forfeiture upon the later of the occurrence of such event or his incurrence of a Break in Service.

(B) The events referred to in (A) above are as follows:

(i) The Executive Committee of an Employer makes a determination that a Participant, as described in (C) below, has committed any act of dishonesty (of the type commonly considered to be a misdemeanor or a felony) against or with respect to such Employer during his course of employment with such Employer, or against or with respect to any customer of such Employer or other person with whom such Employer deals, or in the course of activities which have arisen by virtue of his having been an Employee; or

(ii) The Executive Committee of an Employer, after the recommendation

of the Administrator, makes a determination that a Participant, as described in (C) below, is engaged in a financial business competing with an Employer, either directly himself or indirectly as an officer, employee, agent, or consultant.

(C) A Participant shall be subject to the application of (A) above only if (i) he has not attained Normal Retirement Age prior to terminating his employment with the Employer and all Affiliates and (ii) he is credited with less than 5 Vesting Years (10 Vesting Years for Participants with no Service on or after January 1, 1989).

(7) Forfeiture for Death After Separation from Service. If a Participant dies after his separation from service with the Employer and if the Administrator has notice thereof, then any forfeitable portion of his Account shall be forfeited.

6.2 Allocation of Forfeitures. Forfeitures shall be added to the Employer's contributions under Section 4.2 of the Plan and, subject to Article 5, allocated to Eligible Participants' Profit Sharing Accounts as if they were part of such contributions.

6.3 Vesting Upon Termination or Partial Termination of the Plan or Discontinuance of Contributions. Notwithstanding the provisions of Section 6.1, upon the termination or partial termination of the Plan or the complete discontinuance of contributions under the Plan, the amounts then credited to all affected Participants' Accounts shall be nonforfeitable.

6.4 Unclaimed Benefits. Anything in the Plan to the contrary notwithstanding, if a Participant or other

person entitled to a benefit (including a benefit being paid or payable under the Old Plan) has not been found within 5 years after such payment becomes due, then such benefit shall be forfeited. However, if such Participant or other person is thereafter located, then, no later than 60 days after the date on which such Participant or other person is located, the Employer shall contribute the amount of such benefit to the Plan, and such contribution shall be used to restore such benefit retroactively and shall be in the same amount as was payable at the time such benefit became due without any adjustment for the time between the date such benefit became due and such restoration.

ARTICLE 7

INVESTMENT OF ACCOUNTS

7.1 Funding Policy and Method.

(a) Establishment. The Administrator shall establish, for the Plan, a funding policy and method, which shall be consistent with the objectives of the Plan, ERISA and any other applicable legal requirements and which shall identify the Plan's short-run and long-run financial needs with respect to liquidity and investment growth, as the same may change from time to time. Such funding policy shall be communicated as soon as practicable to those who are responsible for investment of the Plan Assets.

(b) Funding Entity. The Plan Assets shall be held under and the benefits under the Plan shall be funded through The Fifth Third Profit Sharing Trust as it may be amended from time to time. The trust so established and maintained is and shall be a part of the Plan. In addition, Plan Assets may be held under and

the benefits under the Plan may be funded through such other trusts as the Employer, in its discretion, may establish or cause to be established or entered into for the purposes of carrying out the Plan. The Employer shall determine the form and terms of any such trust, from time to time, consistent with the objectives of the Plan, ERISA and any other applicable legal requirements, and may remove any trustee and select a successor trustee or trustees or may terminate any such trust. Any such trust so established and maintained is and shall be a part of the Plan.

(c) Investment Elections.

(1) Prior to January 1, 2001. Prior to January 1, 2001, each Participant shall elect the manner in which his Section 401(k) Salary Deferral Account, After-Tax Account and Rollover Account and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Prior to January 1, 2001, the investment funds available under the Plan shall be the general trust fund (in which Plan Assets over which the Participant has no investment discretion are segregated), the Fifth Third Stock Fund (as defined below) and such other investment funds as the Administrator directs the Trustee to make available.

(2) On and After January 1, 2001. After December 31, 2000, each Participant shall elect the manner in which his Account, excluding his Employer Matching Account, and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Effective January 1, 2001, the Administrator shall direct the Trustee as to the investment funds to be made

available, including the Fifth Third Stock Fund (as defined below).

(3) Procedural. An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations, require an election to apply consistently to all subaccounts and provide for the investment of an Account of a Participant who fails to make an investment election.

(d) Employer Matching Account. Subject to Section 7.3, the Plan Assets attributable to the Employer Matching Accounts shall be invested in the Fifth Third Stock Fund (as defined below).

7.2 Investment Adjustment. The Administrator shall account for the investments and investment transactions attributable to each Account separately. Earnings or losses on Plan Assets attributable to a particular Account shall be allocated solely to that Account. All determinations of the investment adjustments under this Section and under Sections 7.3 and 7.4 below and any Appendix shall be made by the Trustee, and such determinations when so made by the Trustee shall be conclusive and shall be binding upon all persons.

7.3 Diversification Election. Each Participant who has attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation) may elect the manner

in which his Employer Matching Account and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The first such investment election for a Participant must be implemented no later than 90 days following the Plan Year which follows the Plan Year in which the Participant both attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation). In all events, the Administrator shall direct the Trustee to make available at least three investment funds in addition to the Fifth Third Stock Fund (as defined below).

An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules consistent with the requirements of section 401(a)(28) of the Code including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations, and provide for the investment of an Employer Matching Account of a Participant who fails to make an investment election.

7.4 Fifth Third Stock Fund.

(a) General. The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run

liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(b) Investment Adjustment. The Plan Assets comprising the Fifth Third Stock Fund shall be valued daily at fair market value and the Participants' Accounts (and appropriate subaccounts) shall be adjusted daily to reflect the change in value of the Fifth Third Stock Fund.

(c) Voting of Employer Securities. To the extent a Participant's Account (or any subaccount) is invested in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the Trustee in writing as to the manner in which the shares represented by his interest in such Fund are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(d) ESOP Dividend Pass-Through Election. Effective December 31, 2001, commencing with the dividends payable on the common stock of Fifth Third Bancorp to shareholders of record on December 31, 2001, a Participant with an Account (including any subaccount) invested in the Fifth Third Stock Fund (or

in the event of his death, his Beneficiary), shall have the right to elect, in accordance with instructions or procedures of the Administrator, or its delegate to either (1) leave such dividends in the Plan for reinvestment in common stock of Fifth Third Bancorp under the Fifth Third Stock Fund or otherwise; or (2) take the dividends in cash. This election shall also be available with respect to the Enterprise ESOP Accounts (described in Appendix XV), the Ottawa ESOP Participant Accounts (described in Appendix XVII) and the Fifth Third Stock Investment Option (described in Appendix XVIII including the comparable investment choice under the Old Kent Thrift Plan effective as of December 31, 2001, as it existed on such date immediately prior to the merger into this Plan).

7.5 Life Insurance. No life insurance shall be purchased under the Plan.

7.6 Loans.

(a) Eligibility. Upon filing the proper application form with the Administrator by a Participant, the Administrator may authorize and direct the Trustee on behalf of the Plan, to grant a loan to such Participant from the Plan Assets, subject to the conditions set forth below.

(b) Conditions. Loans under (a) above shall meet all of the following requirements:

(1) Loans shall be made available to all Participants on a reasonably equivalent basis; provided that loans shall not be available to Participants who are not Employees (other than former Employees who are parties in interest within the meaning of section 3(14) of ERISA).

(2) Loans shall be made available only in the following circumstances:

(A) in the event of a hardship (as defined in Section 8.1(b)) of the Participant;

(B) if the Participant will use the loan proceeds for any educational needs of the Participant or family members of the Participant (including the repayment of any prior student loan);

(C) if the Participant will use the loan proceeds for the care of one or more family members of the Participant; or

(D) if the Participant will use the proceeds to purchase (through the exercise of stock options or otherwise) for investment purposes shares of common stock of Fifth Third Bancorp (including the repayment of any loan incurred by the Participant prior to November 1, 1996, if the proceeds of such prior loan were used for such purpose).

(3) Prior to borrowing from the Plan, a Participant must withdraw all of his After-Tax Account (if any) and any other amounts in a subaccount referred to in an Appendix attributable to after-tax employee contributions.

(4) A Participant may borrow solely from his Section 401(k) Salary Deferral Account, Frozen Cash Election Account, Rollover Account and other subaccounts referred to in an Appendix to the extent attributable to elective deferrals described in section 402(g)(3) of the Code or rollover contributions.

(5) A Participant may have only one loan outstanding at any time.

(6) A Participant loan must be in an amount equal to at least $1,000.

(7) Loans shall not be made available to Highly Compensated Employees in an amount greater than the amount made available to other Participants.

(8) Loans shall bear a reasonable rate of interest equal to the rate that the Fifth Third Bank, in its lending business, would charge on a similar loan.

(9) Loans shall be adequately secured, which security shall, notwithstanding Section 14.2, consist of an assignment of up to 50 percent of a borrowing Participant's nonforfeitable Account under the Plan. The Administrator may allow such an assignment to consist solely of amounts not attributable to elective deferrals described in section 402(g)(3) of the Code if such amounts would constitute adequate security.

(10) Loans shall be repaid only by payroll withholding properly authorized by the Participant; provided that the Administrator may allow complete prepayment through other means; and provided further, a Participant who is on a leave of absence may pay installments by personal check or other means to the extent his pay (if any) is insufficient to meet the repayment schedule.

(11) No Participant loan shall exceed the limitations under (c) below.

(12) In the event of default, foreclosure on the Participant's accrued nonforfeitable benefit, to the extent used as security for the loan, will occur after a distributable event occurs under the Plan. Events constituting default shall be specified in the promissory note or security agreement to be executed by the Participant.

(c) Limitation on Amount. A loan under the Plan (when added to any other loans outstanding under the Plan and any other plans taken into account under section 72(p)(2)(D) of the Code) to a Participant shall not exceed the lesser of:

(1) $50,000 reduced by the excess (if any) of -

(A) the highest outstanding balance of loans from the Plan (and other plans taken into account) during the one-year period ending on the day before the date on which such loan was made, over

(B) the outstanding balance of loans from the Plan (and other plans taken into account) on the date such loan was made, or

(2) one-half of the nonforfeitable portion of the Participant's Account.

(d) Distributable Event. Solely for purposes of foreclosure on the Participant's nonforfeitable Account, to the extent used as security for the loan, default on a Participant's note shall be deemed to be a distributable event for such a Participant (in addition to the other distributable events under the Plan); provided however, with respect to a Participant's Section 401(k) Salary Deferral Account, Frozen Cash Election Account

and any other amounts subject to the distribution limitations of section 401(k)(2), to the extent used as security for the loan, such a default shall be deemed a distributable event if, and only if, the Participant has attained age 59-1/2.

(e) Repayment Period. Each loan, by its terms, shall be required to be repaid within 5 years. In addition, loans shall be due and payable in full upon a Participant's termination of employment (except in the case of parties in interest within the meaning of section 3(14) of ERISA) and such repayment need not be through payroll withholding.

(f) Level Amortization. Each loan shall be subject to substantially level amortization, with payments of principal and interest not less frequently than quarterly, over the term of the loan.

(g) Earmarking. If a loan is made to a Participant pursuant to (a) above, then his interest in other Plan Assets shall be reduced by the amount of the loan, the loan shall be an investment of his Account, and interest and other amounts allocable to such loan shall be allocated only to his Account.

(h) Effect of Default on Benefits. Upon a Participant's death, if less than 100 percent of his Account is payable to his Surviving Spouse, then, in determining the amount payable to the Surviving Spouse, the amount treated as payment in satisfaction of any loan (including accrued interest) shall first be treated as reducing the Account.

(i) Administration. The Administrator is authorized to administer the loan program. Loans will be approved if the proper forms and documentation are

completed and delivered to the Administrator, the amount of the loan requested does not exceed the limits specified in this Section, adequate security authorized in this Section is delivered to the Trustee, and the other provisions of this Section are satisfied. The Administrator is authorized to impose on a Participant a reasonable administrative fee for his loan.

ARTICLE 8

WITHDRAWALS AND DISTRIBUTIONS

8.1 Hardship Withdrawals.

(a) Election. During his employment with the Employer, and subject to filing such forms and following such time and other limitations as the Administrator shall prescribe, a Participant may make withdrawals in the event of hardship from his Rollover Account first and then his Section 401(k) Salary Deferral Account except to the extent a loan is secured thereby; provided however, that the aggregate of any such withdrawals from his Section 401(k) Salary Deferral Account shall not exceed the aggregate of the compensation reduction contributions made on the Participant's behalf under Section 4.1.

(b) Hardship.

(1) General. For purposes of (a) above, "hardship" means an immediate and heavy financial need of an Employee determined in accordance with (2) below. A withdrawal based upon financial hardship cannot exceed the amount required to satisfy that need (including taxes and penalties on the withdrawal) determined in accordance with (3) below.

(2) Immediate and Heavy Financial Need. A withdrawal will be deemed to be made on account of an immediate and heavy financial need of an Employee if and only if the withdrawal is on account of:

(A) medical expenses described in section 213(d) of the Code previously incurred by the Employee, the Employee's spouse, or any dependents of the Employee (within the meaning of section 152 of the Code) or the need for any such person to obtain such medical care;

(B) purchase (excluding mortgage payments) of a principal residence of the Employee;

(C) payment of tuition (and related educational fees) for the next 12 months of post-secondary education for the Employee, his spouse, children, or other dependents;

(D) the need to prevent the eviction of the Employee from his principal residence or foreclosure on the mortgage on the Employee's principal residence; or

(E) effective December 31, 2001, such other facts and circumstances that the Administrator (or its delegate) in its sole, absolute and uncontrolled discretion, determines on the basis of such evidence as it determines to be satisfactory, constitute an immediate and heavy financial need of a particular Employee.

(3) Necessity of the Withdrawal. A withdrawal will be deemed necessary to satisfy an immediate and heavy financial need if and only if the

Administrator relies on the Employee's representations (unless the Administrator has actual knowledge to the contrary) that the need cannot be relieved by any of the following:

(A) reimbursement or compensation by insurance, or otherwise;

(B) reasonable liquidation of the Employee's assets and the assets of the Employee's spouse and minor children (except for such assets which are held under an irrevocable trust or under the Uniform Gifts to Minors Act) to the extent such liquidation itself would not cause an immediate and heavy financial need;

(C) discontinuance of compensation reduction contributions under Section 4.1 and voluntary participant contributions under Section 4.5 by the Employee to the Plan;

(D) available distributions or loans from all plans maintained by the Employer or by another employer; or

(E) loans from banks or other commercial lenders.

(c) Time of Payment. Any withdrawal pursuant to this Section shall be payable in a reasonable time (giving consideration to the nature of the Plan investments) after the Trustee receives notice of such withdrawal.

(d) Limitations. A request for a withdrawal under this Section may be made only once per Plan Year quarter.

8.2 Withdrawal of Participant Contributions.

(a) Election. A Participant shall have the right to make withdrawals from his After-Tax Account.

(b) Limitations. A request for withdrawal under this Section may be made only once per Plan Year quarter.

(c) Time of Payment. Any withdrawal pursuant to this Section shall be payable as soon as administratively feasible after the Trustee receives notice of such withdrawal.

8.3 Events of Distribution to Participants. A Participant's benefit shall become distributable to him on account of:

(a) termination of employment; or

(b) subject to Section 9.6, the date required under Section 8.5(d).

8.4 Amount of Payment. The amount of any payment under the Plan shall be based on the nonforfeitable percentage of the Participant's Account at the cash value of the Plan Assets allocable to such Account, as said Plan Assets are converted to cash (after taking into account all prior payments and/or withdrawals and the allocation of all contributions to which the Participant is entitled).

8.5 Time of Payment to a Participant.

(a) General. Subject to (b), (c), (d) and (e) below, distribution to a Participant whose benefit has become distributable shall commence as soon as

administratively feasible after the Participant elects commencement of his benefit.

(b) Delay of Distribution for Investigative Purposes. Subject to (d) below, the Administrator shall have the right to delay the payment of a distribution under the Plan for a period not in excess of 12 months from the date of a Participant's termination of employment or from the date of a Participant's death, as the case may be, so that investigative procedures appropriate for a determination under Section 6.1(f)(6) can be made. Such delay may be made with no evidence or inference of the commission of any act of dishonesty or competition, other than the fact that good banking practices may indicate the desirability for such investigative procedures to be made.

(c) Participant Consent.

(1) General. If the value of a Participant's nonforfeitable benefit under the Plan exceeds $5,000 (or, for distributions prior to October 17, 2000, at the time of any prior distribution exceeded $5,000) (excluding the value of a Participant's Rollover Account for distributions after December 31, 2001), then no part of such benefit may be distributed to him prior to Normal Retirement Age unless he consents in writing to the distribution.

(2) Written Explanation. The Administrator shall provide to each Participant whose consent is required under (1) above, no less than 30 days and no more than 90 days prior to the commencement of benefit payments, a written explanation of the material features and relative values of the optional forms of benefit under the Plan, and his

right (if any) to defer receipt of the distribution. A Participant may elect to commence his distribution in less than thirty days (if administratively feasible) from the date he is provided with the explanation provided he is informed of his right to the 30-day period.

(3) Time of Consent. A Participant's consent to a distribution must not be made before he receives the written explanation under (2) above and must not be made more than 90 days before benefit payments commence.

(d) Latest Date of Payment. The payment of a Participant's distribution under the Plan shall begin not later than the earlier of:

(1) the later of:

(A) the 60th day after the close of the Plan Year in which occurs the latest of

(i) the attainment by the Participant of Normal Retirement Age,

(ii) the 10th anniversary of the date on which the Participant commenced participation in the Plan, or

(iii) the termination of the Participant's service with the Employer and all Affiliates; or

(B) such date as the Participant may elect (hut not earlier than the consent of a person if required under (c) above), or

(2) the April of the calendar year following the later of

(A) the calendar year in which the Participant attains age 70-1/2 or

(B) the calendar year in which the Participant retires; provided however, this subparagraph (B) shall not apply to a Participant who is a Five-Percent Owner.

With respect to a Participant who first becomes a Five-Percent Owner in a Plan Year after the Plan Year ending in the calendar year in which he attains age 70-1/2, the calendar year in which such subsequent Plan Year ends shall be the applicable time for purposes of subparagraph (B).

For calendar years prior to the Effective Date, Participants other than Five-Percent Owners who attained age 70-1/2 in 1996 or later were given the election to defer the commencement of their distributions until the applicable time in (d)(2) above (rather than commencing distributions under the Old Plan provisions then in effect).

(e) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount payable to a Participant under the Plan shall be paid in a single sum, provided that the value of the Participant's nonforfeitable benefit under the Plan (excluding the value of a Participant's Rollover Account for distributions after December 31, 2001), determined as of the date of distribution (or, for distributions prior to October 17, 2000, any prior distributions), does not exceed $5,000 and such payment is made before payment otherwise begins. Such single sum shall be paid as soon as

administratively feasible after the amount otherwise becomes distributable under the Plan.

8.6 Restrictions on Section 401(k) Withdrawals and Distributions. Notwithstanding any other provisions to the contrary, a Participant's Frozen Cash Election Account, Section 401(k) Salary Deferral Account and any other portion of his Account attributable to compensation deferral contributions under a section 401(k) feature of a Predecessor Plan shall not be withdrawn or distributed earlier than one of the following:

(a) the Participant's separation from service ("severance from employment" for distributions after December 31, 2001);

(b) the Participant's death;

(c) the Participant's incurrence of a Disability;

(d) the termination of the Plan without the establishment or maintenance of another defined contribution plan (other than an employee stock ownership plan, as defined in section 4975(e) or 409 of the Code, or a simplified employee pension, as defined in section 408(k) of the Code);

(e) the date of the disposition by a corporation of substantially all of the assets (within the meaning of section 409(d)(2) of the Code) used by such corporation in a trade or business of such corporation if the corporation continues to maintain the Plan, and if the purchaser is unrelated and does not adopt or maintain the Plan, but only with respect to an Employee who

continues employment with the corporation acquiring such assets;

(f) the date of the disposition by a corporation of such corporation's interest in a subsidiary (within the meaning of section 409(d)(3) of the Code) if the corporation continues to maintain the Plan, and if the purchaser is unrelated and does not adopt or maintain the Plan, but only with respect to an Employee who continues employment with such subsidiary;

(g) to the extent provided in Article 8, attainment of age 70-1/2 or incurrence of a hardship.

An event described in (d), (e) or (f) shall qualify as an event allowing a withdrawal or distribution only if the payment is in a lump sum.

8.7 Effect of Reemployment. If a Participant is reemployed by an Employer subsequent to the commencement of a distribution to him under the Plan, then, subject to Section 8.5(d), the payment of any unapplied amount from his Account may be suspended at the election of the Participant during the period of such reemployment and, if so suspended, then shall resume as of the first day of the month following the termination of his reemployment.

ARTICLE 9

FORM OF PAYMENT TO PARTICIPANTS

9.1 General.

(a) Withdrawals. Any withdrawal made pursuant to Section 8.1 or 8.2 shall be paid in a single sum.

(b) Distributions. The distribution to which a Participant is entitled shall, subject to (c) below, be paid in such of the following forms as the Participant elects:

(1) a single sum,

(2) periodic installments, not less frequently than annually, with any installments remaining unpaid at the Participant's death to be paid to his Beneficiary,

(3) effective December 31, 2001, a partial cash withdrawal, no more frequent than once per Plan Year, of the portion of the Participant's vested Account the Participant specifies, with the remaining portion of the Participant's vested Account balance deferred until future payment under the terms of the Plan, or

(4) with respect to Participants covered by an Appendix, such other form or forms as are specified in the applicable Appendix.

The foregoing are the exclusive forms of benefit available under the Plan. References below to annuity forms of payment serve only to implement the minimum distribution rules with respect to annuity forms otherwise available to particular Participants under an Appendix.

If a single sum payment is otherwise applicable, to the extent the Participant has his Account invested in the Fifth Third Stock Fund, he may elect to have whole shares of Fifth Third Bancorp stock distributed to him in accordance with rules and procedures established by

the Administrator, with the remainder of his distribution in cash.

In the absence of a valid election by the date benefit payments are to commence, the form of payout shall be a single sum cash distribution.

(c) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount payable to a Participant under the Plan shall be paid in a single sum, provided that the value of the Participant's nonforfeitable benefit under the Plan, determined as of the date of distribution exceeds $5,000 (or, for distributions prior to October 17, 2000 at the time of any prior distribution exceeded $5,000) (excluding the value of a Participant's Rollover Account for distributions after December 31, 2001), and such payment is made before payment otherwise begins. Such single sum shall be paid as soon as administratively feasible after the amount otherwise becomes distributable under the Plan.

9.2 Incidental Benefits. In determining the minimum distributions during the Participant's lifetime for years in which minimum distributions are required under Section 9.4, if the Participant's benefit is distributed other than as a single life annuity and if the Participant has a Beneficiary other than his spouse, in no event shall the divisor specified in Section 9.4(a) exceed the divisor specified in Treasury Regulations under section 401(a)(9) of the Code applicable for the incidental benefit requirement. If the Participant's Account is used to purchase an annuity contract (other than a single life annuity) from an insurance company in order to provide the Participant's benefit, the maximum period certain and the maximum

survivor annuity permissible in the case of a non-spouse Beneficiary, shall be determined in accordance with Treasury Regulations under section 401(a)(9) of the Code. In the case of a change in Beneficiaries the minimum distributions required shall be determined in accordance with applicable Treasury Regulations under section 401(a)(9) of the Code.

9.3 Distribution Periods.

(a) General. Except to the extent that distribution is made in the form of a lump sum, and subject to the provisions of any Appendix relating to the qualified joint and survivor annuity under section 417 of the Code, distribution to a Participant must be made over any of the following periods (or any combination thereof):

(1) the life of the Participant;

(2) the lives of the Participant and his Beneficiary (if the Beneficiary is an individual);

(3) a period certain not extending beyond the life expectancy of the Participant; or

(4) a period certain not extending beyond the joint life and last survivor expectancy of the Participant and his Beneficiary (if the Beneficiary is an individual).

(b) Determination of Distribution Periods. For purposes of determining minimum distributions under Section 9.4, the determination of distribution periods under (a) above shall be made in accordance with section 401(a)(9) of the Code, the Treasury Regulations thereunder and the following:

(1) the Beneficiary as of the date benefits are required to commence under Section 8.5(d)(2), shall be determinative; provided that if annuity payments commence to a Participant on or before the date benefits are required to commence, the Beneficiary determined as of any date during the 90 days before the commencement of annuity payments shall be determinative;

(2) if more than one individual would be a Participant's Beneficiary as of the date benefits are required to commence under Section 8.5(d)(2), the individual Beneficiary with the shortest life expectancy shall be determinative; provided that if the Participant's spouse is a Beneficiary and the spouse's life expectancy is recalculated pursuant to Section 9.5, that recalculated life expectancy shall be compared annually to the remaining life expectancies of the other Beneficiaries, not recalculated, and the shortest life expectancy shall be used for determining the minimum distribution for that calendar year;

(3) if, as of the date benefits are required to commence under Section 8.5(d)(2), at least one of the Participant's Beneficiaries would be other than an individual (other than a trust satisfying the requirements of (5) below), the distribution periods specified in (a)(2) and (4) above shall not be available;

(4) any Beneficiary whose entitlement, as of that date, is contingent on the death of a prior Beneficiary shall be disregarded;

(5) if a trust is a Participant's Beneficiary, the beneficiaries of that trust (and not the trust itself) shall be treated as the Participant's

Beneficiaries if all of the following requirements are met:

(A) the trust is valid under state law (or would be but for the fact that there is no corpus);

(B) the trust is irrevocable;

(C) the trust's beneficiaries are identifiable from the trust instrument; and

(D) a copy of the trust instrument is provided to the Plan.

(c) Change in Beneficiaries. If, after the date benefits are required to commence under Section 8.5(d)(2), there is a new or additional Beneficiary or other change in Beneficiaries, the distribution periods under (a) shall be affected as provided in section 401(a)(9) of the Code, the Treasury Regulations thereunder and the following:

(1) if the new Beneficiary is an individual with a life expectancy shorter than the life expectancy of the Beneficiary whose life expectancy was used for determining the maximum distribution periods under (a) above, the maximum distribution period shall be recalculated as of the date benefits were required to commence under Section 8.5(d)(2), effective for calendar years subsequent to the year of the Beneficiary change; provided that if one of the beneficiaries involved is the Participant's spouse and the spouse's life expectancy is recalculated pursuant to Section 9.5, that recalculated life expectancy shall be compared annually to the remaining life expectancies of the other Beneficiaries, not recalculated, and the

shortest life expectancy shall be used for determining the minimum distribution for that year and each succeeding year.

(2) if the new Beneficiary is an individual with a life expectancy longer than the life expectancy of the Beneficiary whose life expectancy was being used, there shall be no effect on the maximum distribution periods even though the old beneficiary is no longer a Beneficiary; provided that if one of the beneficiaries involved is the Participant's spouse and the spouse's life expectancy is recalculated pursuant to Section 9.5, that recalculated life expectancy shall be compared annually to the remaining life expectancies of the other Beneficiaries, not recalculated, and the shortest life expectancy shall be used for determining the minimum distribution for that year and each succeeding year;

(3) if the change results in the Participant having a Beneficiary which is not an individual (other than a trust meeting the requirements of (b)(5) above), or, if a trust satisfying the requirements of (b)(5) above as of the date benefits were required to commence under Section 8.5(d)(2) later fails to satisfy those requirements, the distribution periods specified in (a)(2) and (4) above shall no longer be available and the maximum distribution periods under (a) shall be recalculated as of the date benefits were required to commence under Section 8.5(d)(2), effective for the calendar years subsequent to the year of the Beneficiary change, or trust change, as the case may be;

(4) if the Beneficiary whose life expectancy was used for determining the maximum

distribution periods under (a) dies, such Beneficiary's remaining life expectancy (deemed to be zero in the case of a Participant's spouse if life expectancies had been recalculated pursuant to Section 9.5) shall continue to apply whether or not a Beneficiary with a shorter life expectancy receives the benefits.

9.4 Minimum Distribution.

(a) General. Subject to Sections 9.6 and 9.9, if the Participant's entire interest is to be distributed in a form other than a lump sum (or under an Appendix, a qualified joint and survivor annuity under section 417 of the Code), then the minimum amount to be distributed beginning with the first calendar year for which distributions are required and for each succeeding calendar year, will, to the extent of his Account balance, be the amount equal to the quotient obtained by dividing his Account balance by the life expectancy of the Participant or the joint life and last survivor expectancy of the Participant and his Beneficiary. The first calendar year for which distributions are required is the calendar year in which the Participant attains age 70-1/2, retires or becomes a Five-Percent Owner (whichever is determinative of the latest commencement date under Section 8.5(d)(2)).

(b) Time for Distributions. The distribution for the first calendar year for which distributions are required shall be made on or before the applicable April 1 determined under Section 8.5(d)(2). The minimum distribution for succeeding calendar years (including the calendar year in which such applicable April 1 falls) shall be made on or before December 31 of each such year.

(c) Account Balance. For purposes of determining required minimum distributions, the relevant Account balance shall be the Account balance as of the last Accounting Date in the calendar year immediately preceding the calendar year for which the required distributions are being determined, increased by the amount of any contributions and forfeitures made by or on behalf of the Participant as of dates in such immediately preceding calendar year after such last Accounting Date, reduced by any payments or withdrawals in such immediately preceding calendar year after such last Accounting Date, and, in the case of minimum distributions for the second calendar year for which distributions are required, reduced by distributions made in such second calendar year on or before the required benefit commencement date (under Section 8.5(d)(2)) that are not in excess (when added to amounts distributed in the first calendar year) of the amount required to meet the minimum distribution for the first calendar year; provided that, in no event shall an amount greater than the Participant's nonforfeitable percentage be distributed.

(d) Survivor Benefits. Any survivor benefits under this Article 9 shall be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death; provided that if the Participant dies before the latest commencement date for benefits under Section 8.5(d)(2) and has been receiving benefits in a form other than an annuity, the remaining survivor benefits must also be distributed as rapidly as provided in Section 10.2.

(e) Annuity Contracts. If a Participant's Account is used to purchase an annuity contract from

an insurance company in order to provide the Participant's benefit, notwithstanding the foregoing, the minimum distribution requirements will be satisfied if the annuity provides for periodic payments at intervals not longer than one year, commencing on or before the date a minimum distribution would otherwise be required over a period not exceeding the maximum period described in Section 9.3 remaining (without recalculation of life expectancies after the annuity purchase). Any such annuity contract must satisfy the requirements of the applicable Treasury Regulations under section 401(a)(9) of the Code.

9.5 Life Expectancy.

(a) General. For purposes of Sections 9.3 and 9.4, life expectancy and joint life and last survivor expectancy will be computed in accordance with applicable Treasury Regulations under section 401(a)(9) of the Code and by the use of the return multiples contained in Tables V and VI of Treasury Regulation 1.72-9 and, except as provided in (b) and (c) below, will be determined as of the Participant's (and Beneficiary's) birthday in the calendar year in which the Participant attains age 70-1/2, retires or becomes a Five-Percent Owner (whichever is determinative of the latest commencement date under Section 8.5(d)(2)), and such multiple shall be reduced by one for each subsequent taxable year.

(b) Recalculation. If the Participant so elects, the life expectancy of a Participant and/or his spouse may be recalculated no more frequently than annually if such election is irrevocable, is made no later than the date benefits must commence under Section 8.5(d)(2), and is applicable to all subsequent years. If

recalculation is applicable, the life expectancy of the participant or spouse shall be determined using his or her age as of his or her birthday in each succeeding calendar year.

(c) Annuity Contracts. If annuity payments commence to a Participant before the latest commencement date under Section 8.5(d)(2), life expectancies of the Participant and Beneficiary shall be determined as of their birthdays in the calendar year in which payments commence.

9.6 Transitional Rule.

(a) General. Anything in the Plan (other than the provisions in any Appendix relating to the qualified joint and survivor annuity and the preretirement survivor annuity under section 417 of the Code) to the contrary notwithstanding, distribution on behalf of any Participant may be made in accordance with the following requirements (regardless of when such distribution commences):

(1) the distribution is one which would not have disqualified the Plan under section 401(a)(9) of the Code as in effect prior to amendment by the Deficit Reduction Act of 1984;

(2) the distribution is in accordance with a method of distribution designated by the Participant whose interest is being distributed or, if the Participant is deceased, by a beneficiary of such Participant;

(3) such designation was in writing, was signed by the Participant or beneficiary, and was made before January 1, 1984;

(4) the Participant had accrued a benefit under the Plan as of December 31, 1983; and

(5) the method of distribution designated by the Participant or the beneficiary specifies the form of the distribution, the time at which distribution will commence, the period over which distributions will be made, and in the case of any distribution upon the Participant's death, the beneficiaries of the Participant listed in order of priority.

(b) Distributions Upon Death. A distribution upon death will not be covered by this transitional rule unless the information in the designation contains the required information described above with respect to the distributions to be made upon the death of the Participant.

(c) Distributions Commencing Before January 1, 1984. For any distribution which commences before January 1, 1984, but continues after December 31, 1983, the Participant, or the beneficiary, to whom such distribution is being made, will be presumed to have designated the method under which the distribution is being made if the method of distribution was specified in writing and the distribution satisfies the requirements in paragraphs (1) and (5) of (a) above.

(d) Effect of Revocation. If a designation is revoked, any subsequent distribution must satisfy the requirements of section 401(a)(9) of the Code as in effect at the time and the Treasury Regulations thereunder. If a designation is revoked, the Plan shall distribute by the end of the calendar year following the

calendar year in which the revocation occurs, the total amount not yet distributed which would have been required under section 401(a)(9) of the Code (including, for calendar years after 1988, the minimum distribution incident benefit requirement), had the designation not been in effect. Any changes in the designation will be considered to be a revocation of the designation; provided however, the mere substitution or addition of another beneficiary (one not named in the designation) under the designation will not be considered to be a revocation of the designation so long as such substitution or addition does not alter the designation, directly or indirectly (for example, by altering the relevant measuring life).

9.7 Distributions under Predecessor Plans. The amount and form of any distribution being paid or payable or forfeited under a Predecessor Plan to or by a person, by reason of the occurrence of any event prior to the effective date of the merger of such Predecessor Plan into the Plan, shall continue to be subject to the provisions of such Predecessor Plan as in effect on the date of such occurrence, unless otherwise expressly provided by the Plan.

9.8 Direct Rollover.

(a) General. This Section applies to distributions made on or after January 1, 1993. Notwithstanding any provision of the Plan to the contrary that would otherwise limit a distributee's election under this Section, but subject to such exceptions permitted by the Internal Revenue Service, a distributee may elect, at the time and in the manner prescribed by the Plan Administrator, to have any portion of an eligible rollover distribution paid directly

to an eligible retirement plan specified by the distributee in a direct rollover.

(b) Definitions.

(1) Eligible rollover distribution. An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more; any distribution to the extent such distribution is required under section 401(a)(9) of the Code; any hardship distribution described in section 401(k)(2)(B)(i)(IV) received after December 31, 1998; and the portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net unrealized appreciation with respect to employer securities).

(2) Eligible retirement plan. An eligible retirement plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, an annuity plan described in section 403(a) of the Code, or a qualified trust described in section 401(a) of the Code, that accepts the distributee's eligible rollover distribution. However, in the case of an eligible rollover distribution to the surviving spouse, an eligible retirement plan is an individual retirement account or individual retirement annuity.

(3) Distributee. A distributee includes an employee or former employee. In addition, the employee's or former employee's surviving spouse and the employee's or former employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in section 414(p) of the Code, are distributees with regard to the interest of the spouse or former spouse.

(4) Direct rollover. A direct rollover is a payment by the Plan to the eligible retirement plan specified by the distributee.

(c) EGTRRA Modifications.

(1) Effective Date. This subsection shall apply to distributions made after December 31, 2001.

(2) Modification of Definition of Eligible Retirement Plan. For purposes of the direct rollover provisions in Section 9.8, an eligible retirement plan shall also mean an annuity contract described in section 403(b) of the Code and an eligible plan under section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. The definition of eligible retirement plan shall also apply in the case of a distribution to a surviving spouse, or to a spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in section 414(p) of the Code.

(3) Modification of Definition of Eligible Rollover Distribution to Exclude Hardship

Distributions. For purposes of the direct rollover provisions in Section 9.8, any amount that is distributed on account of hardship shall not be an eligible rollover distribution and the distributee may not elect to have any portion of such a distribution paid directly to an eligible retirement plan.

(4) Modification of Definition of Eligible Rollover Distribution to Include After-Tax Employee Contributions. For purposes of the direct rollover provisions in Section 9.8, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions which are not includible in gross income. However, such portion may be transferred only to an individual retirement account or annuity described in section 408(a) or (b) of the Code, or to a qualified defined contribution plan described in section 401(a) or 403(a) of the Code that agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

9.9 New Minimum Distribution Requirements. With respect to distributions under the Plan made for calendar years beginning on or after January 1, 2001, the Plan will apply the minimum distribution requirements of section 401(a)(9) of the Code in accordance with the regulations under section 401(a)(9) that were proposed on January 17, 2001 (the 2001 Proposed Regulations), notwithstanding any provision of the Plan to the contrary. This amendment shall continue in effect until the last calendar year beginning

before the effective date of the final regulations under section 401(a)(9) or such other date as may be specified in guidance published by the Internal Revenue Service.

ARTICLE 10

DEATH BENEFITS

10.1 Death Benefit.

(a) Entitlement. Upon the death of a Participant, prior to the application of his Account for his benefit and after receipt by the Administrator of proof of such Participant's death in a form it determines to be proper, his Beneficiary shall be entitled to a benefit equal to:

(1) the nonforfeitable percentage of such Participant's Account at the cash value of the Plan Assets allocable to such Account as said Plan Assets are converted to cash; plus

(2) any nonforfeitable contributions made by or on behalf of such Participant not yet credited to his Account; minus

(3) any payments to and/or withdrawals by such Participant not yet debited to his Account.

(b) Payment of Death Benefits.

(1) General. Death benefits under (a) above shall, subject to the subsections below, be payable to a Participant's Beneficiary in such of the following forms as the Participant or Beneficiary elects:

(A) a single sum,

(B) periodic installment payments, not less frequently than annually, with any installments remaining unpaid at the Beneficiary's death to be paid to the Participant's remaining Beneficiary, or

(C) with respect to Participants (and their Beneficiaries) covered by an Appendix, such other form or forms of death benefit as are specified in the applicable Appendix.

Subject to (c) below, distribution of death benefits under (a) above shall commence at such time as the Participant or Beneficiary elects and, unless administratively impractical, shall first be available for distribution within 90 days after the Participant's death.

The foregoing are the exclusive forms of death benefit under (a) above available under the Plan. References below to annuity forms of payment serve only to implement the minimum distribution rules with respect to annuity forms of death benefit otherwise available to particular Beneficiaries under an Appendix.

(2) Election. An election by a Participant or Beneficiary under (1) above must be made no later than the earliest date specified in (c)(1) and (2) below for the commencement of death benefits. As of such date, the election must be irrevocable with respect to the Beneficiary (and all subsequent Beneficiaries) and must apply to all subsequent years. In the absence of a valid election by the required date, the death benefits under (a) shall be distributed as soon as administratively feasible after the date by

which the election would have been required in a single sum.

(c) Distribution Periods. Subject to Section 9.6, death benefits under (a) above shall be distributed to a Participant's Beneficiary:

(1) no later than December 31 of the calendar year containing the fifth anniversary of the Participant's death; or

(2) if the Beneficiary is an individual:

(A) beginning not later than December 31 of the calendar year immediately following the calendar year of the Participant's death (or, if later, and if the Beneficiary is the Participant's spouse, not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2, and if such spouse dies before payments are required to commence, then the distribution period hereunder shall be determined as if such spouse were the Participant); and

(B) (i) over the life of such Beneficiary (if the Beneficiary is an individual) or

(ii) over a period not extending beyond the life expectancy of such Beneficiary if the Beneficiary is an individual).

(d) Determination of Distribution Periods. The determination of distribution periods under (c)(2) above shall be made in accordance with section 401(a)(9) of the Code, the Treasury Regulations thereunder and the following:

(1) the Beneficiary as of the date of the Participant's death (or, if applicable, the surviving spouse's death) shall be determinative;

(2) if more than one individual would be a Participant's (or surviving spouse's) Beneficiary as of the date of the Participant's death (or, if applicable, the surviving spouse's death) the individual Beneficiary with the shortest life expectancy shall be determinative; provided that if the Participant's spouse is a Beneficiary and the spouse's life expectancy is recalculated pursuant to (f) below, that recalculated life expectancy shall be compared annually to the remaining life expectancies of the other Beneficiaries, not recalculated, and the shortest life expectancy shall be used for determining the minimum distribution for that calendar year;

(3) if, as of the date of the Participant's death, at least one of the Participant's Beneficiaries is other than an individual (other than a trust satisfying the requirements of (5) below), the distribution periods specified in (c)(2) above shall not be available;

(4) any Beneficiary whose entitlement, as of the date of the Participant's death, is contingent on the death of a prior Beneficiary shall be disregarded;

(5) if a trust is a Participant's Beneficiary as of the date of the Participant's death, the beneficiaries of that trust (and not the trust itself) shall be treated as the Participant's Beneficiaries if all of the following requirements are met:

(A) the trust is valid under state law (or would be but for the fact that there is no corpus);

(B) the trust is irrevocable;

(C) the trust's beneficiaries are identifiable from the trust instrument; and

(D) a copy of the trust instrument is provided to the Plan.

(e) Minimum Distribution.

(1) General. Subject to Sections 9.6 and 9.9, the minimum amount to be distributed beginning with the first calendar year for which distributions are required and for each succeeding calendar year, will, to the extent of the Participant's Account balance, be the amount equal to the quotient obtained by dividing his Account balance by the life expectancy of the Beneficiary. The first calendar year for which distributions are required is the calendar year in which the Participant dies or a spouse dies (whichever is applicable).

(2) Time for Distributions. Distributions which are required shall be made on or before December 31 each year commencing with the calendar year specified in (c)(2)(A) above.

(3) Account Balance. For purposes of determining required minimum distributions, the relevant Account balance shall be the Account balance as of the last Accounting Date in the calendar year immediately preceding the calendar year for which the required distributions are being determined, increased by the amount of any contributions and forfeitures made by or on behalf of the Participant as of dates in such immediately preceding calendar year after such last Accounting Date, reduced by any payments or

withdrawals in such immediately preceding calendar year after such last Accounting Date; provided that, in no event shall an amount greater than the Participant's nonforfeitable percentage be distributed.

(f) Life Expectancy.

(1) General. For purposes of Sections (c),(d) and (e) above, life expectancy will be computed in accordance with applicable Treasury Regulations under section 401(a)(9) of the Code and by the use of the return multiples contained in Tables V and VI of Treasury Regulation 1.72-9 and, except as provided in (b) and (c) below, will be determined as of the Beneficiary's birthday in the calendar year in which distributions are required to commence under (c)(2) above, and such multiple shall be reduced by one for each subsequent taxable year.

(2) Recalculation. If a Beneficiary who was the Participant's spouse so elects, the life expectancy of such spouse may be recalculated no more frequently than annually if such election is irrevocable, is made no later than the date benefits must commence under (c)(2) above, and is applicable to all subsequent years. If recalculation is applicable, the life expectancy of the spouse shall be determined using his or her age as of his or her birthday in each succeeding calendar year.

(3) Annuity Contracts. If annuity payments commence irrevocably to a Beneficiary before the latest commencement date under (c)(2) above, the Beneficiary's life expectancy shall be determined as of his birthday in the calendar year in which payments commence.

ARTICLE 11

ADMINISTRATION

11.1 Administrator.

(a) Named Fiduciary. The Administrator shall be a "Named Fiduciary" for the Plan.

(b) Responsibilities. The Administrator shall discharge its responsibilities with respect to the Plan in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of title I of ERISA.

(c) Powers. In addition to the powers which are expressly provided in the Plan, the Administrator shall have the power and authority in its sole, absolute and uncontrolled discretion to control and manage the operation and administration of the Plan and shall have all powers necessary to accomplish these purposes including, but not limited to the following:

(1) the power to determine who is a Participant;

(2) the power to determine allocations, balances, and nonforfeitable percentages with respect to Participants' Accounts;

(3) the power to determine when, to whom, in what amount, and in what form distributions are to be made; and

(4) such powers as are necessary, appropriate or desirable to enable it to perform its responsibilities,

including the power to establish rules, regulations and forms with respect thereto.

Benefits under this Plan will be paid only if the Administrator decides in its discretion that the applicant is entitled to them.

11.2 Procedures for Delegation.

(a) Delegations. The Administrator or the Board may delegate to one or more persons or entities certain of its fiduciary responsibilities (other than duties involving the management or control of the Plan Assets) under an arrangement whereby it shall have the opportunity for such periodic review of the delegate's performance as is appropriate under the circumstances and at such times and in such manner as it may choose for the purpose of its evaluation of continuing such designation and delegation and whereby it can promptly terminate the delegate's services.

(b) Advisors. The Administrator shall have the right to employ one or more persons or entities to render advice with regard to any responsibility it has under the Plan.

(c) Claims Review Committee. The Administrator shall create a Claims Review Committee and shall appoint such individuals to serve on that Committee as it deems appropriate from time to time. The Claims Review Committee shall have the duty and power, in its sole, absolute and uncontrolled discretion to administer the initial claims procedure under Section 11.4 and the claim review procedure under Section 11.5. The Claims Review Committee shall have sole, absolute and uncontrolled discretion to decide all

claims under the initial claims procedure and under the claim review procedure and its decisions shall be binding on all parties.

(d) Removal, Resignation, and Vacancies. A holder of a delegated position of fiduciary responsibility (including an individual member of a group holding such position) may be removed therefrom at any time and without cause by the person or entity making the delegation and may resign at any time upon prior written notice to such person or entity. Vacancies in any such positions created by removal, resignation, death or other cause may be filled by such person or entity or the fiduciary responsibilities for such position may be retained and/or redelegated by such person or entity.

11.3 Miscellaneous Administration Provisions.

(a) Administrative Expenses. The Employer may pay the reasonable expenses of administering the Plan, including any expenses incident to the functioning of the Administrator and the professional fees of any consultants or advisors with respect to the Plan; provided however, any expenses not so paid by the Employer shall be paid from the Plan Assets; and provided further, no person who already receives full-time pay from the Employer shall receive any compensation from the Plan, except for reimbursement of expenses properly and actually incurred.

(b) Indemnification. The Employer may indemnify, through insurance or otherwise, some or all of the fiduciaries with respect to the Plan against claims, losses, damages, expenses and liabilities arising

from their performance of their responsibilities under the Plan.

(c) Interpretations. All interpretations of the Plan and questions concerning its administration and application as determined by the Administrator in its sole, absolute and uncontrolled discretion shall be binding on all persons having an interest under the Plan.

(d) Uniform and Non-Discriminatory Application. All determinations and actions under the Plan shall be uniformly and consistently applied in a non-discriminatory manner to all persons under similar circumstances.

(e) Qualified Domestic Relations Order Procedures. The Administrator shall establish reasonable procedures to determine the qualified status, under section 414(p) of the Code, of domestic relations orders and to administer distributions under such qualified orders.

(f) Effectiveness of Elections, etc. An election, designation, request or revocation provided for in the Plan shall be made in writing and shall not become effective until it has been properly filed with the Administrator.

(g) Written Records. The Administrator shall maintain all such books of account and other records and data as are necessary for the proper performance of its responsibilities under the Plan.

(h) Administration Consistent with ERISA and the Code. The Plan is intended to comply with the provisions of ERISA and of the Code, and the Plan

shall be interpreted and administered consistently with such provisions and with the applicable regulations and rulings thereunder.

(i) Service in More Than One Fiduciary Capacity. Any person or entity may serve in more than one fiduciary capacity for the Plan, including service both as Administrator and as trustee.

11.4 Initial Claims Procedure.

(a) Claim.

(1) Filing. In order to present a complaint regarding the nonpayment of a Plan benefit or a portion thereof (a "Claim"), a Participant or beneficiary under the Plan (a "Claimant") or his duly authorized representative must file such Claim by mailing or delivering a writing stating such Claim to the department, officer, or employee responsible for employee benefit matters of the Employer.

(2) Acknowledgment. Upon such receipt of a Claim, the Claims Review Committee shall furnish to the Claimant a written acknowledgment which shall inform such Claimant of the time limit set forth in (b)(1) below and of the effect, pursuant to (b)(3) below, of failure to decide the Claim within such time limit.

(b) Initial Decision.

(1) Time Limit. The Claims Review Committee shall decide upon a Claim within a reasonable period of time after receipt of such Claim; provided however, that such period shall in no event exceed 90 days, unless special circumstances require an

extension of time for processing. If such an extension of time for processing is required, then the Claimant shall, prior to the termination of the initial 90-day period, be furnished a written notice indicating such special circumstances and the date by which the Claims Review Committee expects to render a decision. In no event shall an extension exceed a period of 90 days from the end of the initial period.

(2) Notice of Denial. If the Claim is wholly or partially denied, then the Claims Review Committee shall furnish to the Claimant, within the time limit applicable under (1) above, a written notice setting forth in a manner calculated to be understood by the Claimant:

(A) the specific reason or reasons for such denial;

(B) specific reference to the pertinent Plan provisions on which such denial is based;

(C) a description of any additional material or information necessary for such Claimant to perfect his Claim and an explanation of why such material or information is necessary; and

(D) appropriate information as to the steps to be taken if such Claimant wishes to submit his Claim for review pursuant to Section 11.5, including notice of the time limits set forth in Section 11.5(b)(2).

(3) Deemed Denial for Purposes of Review. If a Claim is not granted and if, despite the provisions of (1) and (2) above, notice of the denial of a

Claim is not furnished within the time limit applicable under (1) above, then the Claimant may deem such Claim denied and may request a review of such deemed denial pursuant to the provisions of Section 11.5.

11.5 Claim Review Procedure.

(a) Claimant's Rights. If a Claim is wholly or partially denied under Section 11.4, then the Claimant or his duly authorized representative shall have the following rights:

(1) to obtain, subject to (b) below, a full and fair review by the Claims Review Committee;

(2) to review pertinent documents; and

(3) to submit issues and comments in writing.

(b) Request for Review.

(1) Filing. To obtain a review pursuant to (a) above, a Claimant entitled to such a review or his duly authorized representative shall, subject to (2) below, mail or deliver a written request for such a review (a "Request for Review") to the department, officer, or employee responsible for employee benefit matters of his Employer.

(2) Time Limits for Requesting a Review. A Request for Review must be mailed or delivered within 60 days after receipt by the Claimant of written notice of the denial of the Claim or within such longer period as is reasonable and related to the nature of the benefit which is the subject of the Claim and to other attendant circumstances.

(3) Acknowledgment. Upon such receipt of a Request for Review, the Claims Review Committee shall furnish to the Claimant a written acknowledgment which shall inform such Claimant of the time limit set forth in (c)(1) below and of the effect, pursuant to (c)(3) below, of failure to furnish a decision on review within such time limit.

(c) Decision on Review.

(1) Time Limit.

(A) General. If, pursuant to (b) above, a review is requested, then, except as otherwise provided in (B) below, the Claims Review Committee or its delegate (but only if such delegate has been given the authority to make a final decision on the Claim) shall make a decision promptly and no later than 60 days after receipt of the Request for Review; except that, if special circumstances require an extension of time for processing, then the decision shall be made as soon as possible but not later than 120 days after receipt of the Request for Review. The Claims Review Committee must furnish the Claimant written notice of any extension prior to its commencement.

(B) Regularly Scheduled Meetings. Anything to the contrary in (A) above notwithstanding, if the decision on review is to be made by a committee which holds regularly scheduled meetings at least quarterly, then its decision on review shall be made no later than the date of the meeting which immediately follows the receipt of the Request for Review; provided however, if such Request for Review is received within 30 days preceding the date of such meeting, then such decision on review shall be made no later than the date

of the second meeting which follows such receipt; and provided further that, if special circumstances require a further extension of time for processing, and if the Claimant is furnished written notice of such extension prior to its commencement, then such decision on review shall be rendered no later than the third meeting which follows such receipt.

(2) Notice of Decision. The Claims Review Committee or its delegate shall furnish to the Claimant, within the time limit applicable under (1) above, a written notice setting forth in a manner calculated to be understood by the Claimant:

(A) the specific reason or reasons for the decision on review; and

(B) specific reference to the pertinent Plan provisions on which the decision on review is based.

(3) Deemed Denial. If, despite the provisions of (1) and (2) above, the decision on review is not furnished within the time limit applicable under (1) above, then the Claimant shall be deemed to have exhausted his remedies under the Plan and he may deem the Claim to have been denied on review.

ARTICLE 12

AMENDMENT AND TERMINATION

12.1 Amendment and Termination.

(a) Right to Amend or Terminate. Fifth Third Bank reserves the right to amend or terminate the Plan in accordance with the procedures set forth in (b) below, and each other Employer irrevocably delegates

such power to Fifth Third Bank. The power to amend and terminate shall include, but not be limited to, the power to merge other plans into this Plan, the power to accept transfers of assets and benefits from other plans, the power to determine the terms of any such merger or transfer; and the power to add, modify or delete an Appendix and to otherwise determine the terms and conditions applicable to any other Employer.

(b) (1) Amendment Procedure. Any amendment of the Plan shall be by action of The Fifth Third Bank Pension and Profit Sharing Committee or the Director of Legal/Human Resources of Fifth Third Bank. If an amendment is being made by the Committee, it must be approved by a majority of the members of the Committee as constituted at the time of adoption of the amendment. Any amendment may be given retroactive effect as determined by said Committee or the Director of Legal/Human Resources of Fifth Third Bank. An amendment may be evidenced in such manner as said Committee or Director of Legal/Human Resources of Fifth Third Bank shall determine. If the amendment is approved by the Committee, such evidence may include (but shall not be limited to) a written resolution signed by a majority of the members of the Committee or minutes of a meeting of the Committee reflecting approval by a majority of the members.

(2) Termination Procedure. Any termination of the Plan shall be by action of The Fifth Third Bank Pension and Profit Sharing Committee. Any termination must be approved by a majority of the members of the Committee as constituted at the time of adoption of the termination; and any such

termination may be given retroactive effect as determined by said Committee. A termination may be evidenced in such manner as said Committee shall determine, and such evidence may include (but shall not be limited to) a written resolution signed by a majority of the members of the Committee or minutes of a meeting of the Committee reflecting approval by a majority of the members.

(c) Conditions on Amendments and Termination.

(1) Accrued Benefit.

(A) General. No amendment to the Plan shall be effective to the extent that it has the effect of reducing a Participant's accrued benefit, except as permitted under section 412(c)(8) of the Code.

(B) Treatment of Certain Amendments. For purposes of (A) above, an amendment which has the effect, with respect to benefits attributable to service before the amendment, of -

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy or

(ii) (except as otherwise provided by Treasury Regulations) eliminating an optional form of benefit shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a Participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

(2) Changes in Vesting Schedule. No amendment shall reduce the nonforfeitable percentage of a Participant's accrued benefit (determined as of the later of the date such amendment is adopted or the date such amendment becomes effective).

12.2 Distribution of Plan Assets Upon Termination of the Plan. If the Plan is terminated, then distributions and withdrawals shall continue to be made as provided in the Plan; provided however, subject to Article 8, the Administrator may cause Participants' Accounts to be paid to them, pursuant to the provisions of Article 9, on account of such termination of the Plan.

ARTICLE 13

TOP-HEAVY RULES

13.1 Definitions. For purposes of this Article 13, the following terms shall have the following meanings:

(a) "Aggregation Group" means:

(1) each qualified plan or simplified employee pension of the Employer or an Affiliate in which a Key Employee is a participant,

(2) each other plan of the Employer or an Affiliate which enables any plan described in (1) above to meet the requirements of section 401(a)(4) or 410 of the Code,

(3) any other plan or plans which the Employer elects to include provided that the group would continue to meet the requirements of sections 401(a)(4) and 410 of the Code with such plan or plans being taken into account, and

(4) any other plan which would have been included in the foregoing had it not terminated.

(b) "Determination Date," with respect to any Plan Year for the Plan, means the last day of the preceding Plan Year (or, in the case of the first Plan Year of the Plan, the last day of such Plan Year).

(c) "Determination Period" means, with respect to any Plan Year, the five Plan Years ending on the Determination Date with respect to such Plan Year.

(d) "Key Employee," with respect to any Plan Year, means, as determined under section 416(i) of the Code, any person who, at any time during the Determination Period with respect to such Plan Year, is:

(1) an officer of the Employer or an Affiliate who:

(A) has Section 415 Compensation (as defined in Section 5.1(g)) greater than 50 percent of the dollar limitation in effect under section 415(b)(1)(A) of the Code for any such Plan Year;

(B) is taken into account under section 416(i) of the Code;

(2) one of the 10 employees who:

(A) owns (or is considered as owning within the meaning of sections 318 and 416(i) of the Code) both more than a ½ percent ownership interest in value and one of the 10 largest percentage ownership interests in value of the Employer; and

(B) has (during the Plan Year of ownership) Section 415 Compensation (as defined in Section 5.1(g)) from the Employer and any Affiliates of more than the limitation in effect under section 415(c)(1)(A) of the Code for the calendar year in which such Plan Year ends;

(3) a Five-Percent Owner; or

(4) a 1-percent owner (as defined in section 416(i) of the Code) of the Employer having Section 415 Compensation (as defined in Section 5.1(g)) from the Employer and any Affiliates of more than $150,000.

(e) "Present Value" means, with respect to a defined benefit plan, the present value based on the interest and mortality rates specified under the applicable defined benefit plan for purposes of computing the Top-Heavy Ratio. The actuarial assumptions used for all plans within the same Aggregation Group must be the same.

(f) "Top-Heavy Plan" means the Plan, with respect to any Plan Year after 1983, if the Top-Heavy Ratio exceeds 60 percent.

(g) "Top-Heavy Ratio" means, for the Plan or an Aggregation Group of which the Plan is part, a fraction, the numerator of which is the sum of defined contribution account balances and the Present Values of defined benefit accrued benefits for all Key Employees and the denominator of which is the sum of defined contribution account balances and the Present Values of defined benefit accrued benefits for all participants. The Top-Heavy Ratio shall be determined in accordance with section 416 of the Code and the

applicable regulations thereunder, including, without limitation, the provisions relating to rollovers and the following provisions:

(1) The value of account balances under the Plan will be determined as of the Determination Date with respect to the applicable Plan Year.

(2) The value of account balances and accrued benefits under plans aggregated with the Plan shall be calculated with reference to the determination dates under such plans that fall within the same calendar year as the applicable Determination Date under the Plan.

(3) The value of account balances and the present value of accrued benefits will be determined as of the most recent valuation date that falls within or ends with the 12-month period ending on the applicable determination date, except as provided in section 416 of the Code and the regulations thereunder for the first and second plan years of a defined benefit plan.

(4) A simplified employee pension shall be treated as a defined contribution plan; provided however, at the election of the Employer, the Top-Heavy Ratio shall be computed by taking into account aggregate employer contributions in lieu of the aggregate of the accounts of employees.

(5) Distributions (including distributions under a terminated plan which had it not been terminated would have been included in the Aggregation Group) within the 5-year period ending on a determination date shall be taken into account.

(6) Defined contribution account balances shall be adjusted to reflect any contribution not actually made as of a determination date but required to be taken into account on that date under section 416 of the Code and the regulations thereunder.

(7) Deductible voluntary contributions shall not be included.

(8) There shall be disregarded the account balances and accrued benefits of a Participant

(A) who is not a Key Employee but who was a Key Employee in a prior Plan Year or

(B) with respect to a plan year beginning after 1984, who has not performed services for the employer maintaining the plan at any time during the 5-year period ending on the determination date.

(9) The accrued benefit of a Participant other than a Key Employee shall be determined (A) under the method, if any, which uniformly applies for accrual purposes under all defined benefit plans of the Employer, or (B) if there is no such method, as if such benefit accrued not more rapidly than the slowest accrual rate permitted under the fractional rule of section 411(b)(1)(C) of the Code.

(h) "Valuation Date," with respect to a Determination Date under the Plan, means the Accounting Date coinciding with such Determination Date.

13.2 Minimum Contribution.

(a) General. For any Plan Year for which the Plan is a Top-Heavy Plan, the Employer contribution and forfeitures (excluding compensation reduction contributions under Section 4.1) allocated on behalf of any Participant who is not a Key Employee and who is an Employee on the last day of the Plan Year shall not be less than such Participant's Section 415 Compensation times the lesser of (1) three percent (3%) or (2) the largest percentage of such contributions and forfeitures (including compensation reduction contributions under Section 4.1), expressed as a percentage of Section 415 Compensation, allocated on behalf of any Key Employee for that Plan Year. For these purposes, "Section 415 Compensation" shall mean the first $170,000 (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Section 415 Compensation (as defined in Section 5.1(g)). This minimum contribution shall be made even though, under other Plan provisions, the Participant would not otherwise be entitled to receive an allocation, or would have received a lesser allocation for the year because the Participant received compensation of less than a stated amount.

(b) Participants Also Covered Under Defined Benefit Plan. If a Participant who is not a Key Employee and who is an Employee on the last day of the Plan Year also participates in one or more defined benefit plans which are part of the same Aggregation Group as the Plan, and if such defined benefit plan or plans do not satisfy the minimum benefit requirements of section 416 of the Code with respect to such Participant, then, with respect to such Participant,

"five percent (5%)" shall be substituted for "the lesser of (1) three percent (3%) or (2) the largest percentage of such contributions and forfeitures (including contributions under Section 4.1 expressed as a percentage of Section 415 Compensation, allocated on behalf of any Key Employee for that Plan Year" in (a) above.

13.3 Vesting Requirements.

(a) Top-Heavy Years. Anything in Article 6 to the contrary notwithstanding, for any Plan Year for which the Plan is a Top-Heavy Plan, a Participant who has at least one Hour of Service after the Plan becomes a Top-Heavy Plan shall have a nonforfeitable right to a percentage of his Frozen Vesting Account determined under the following table; provided however, no Participant's vested percentage (as of the day before the Plan's becoming a Top-Heavy Plan) shall be reduced:

Vesting Years	Nonforfeitable Percentage
Less than 2	0%
2	20%
3	40%
4	60%
5	80%
6 or more	100%

(b) Subsequent Years. If a Participant is covered under the Plan for a Plan Year in which the Plan is a Top-Heavy Plan and the Plan then ceases to be a Top-Heavy Plan for a subsequent Plan Year, then, for each such subsequent Plan Year, the following provisions shall apply:

(1) the nonforfeitable percentage of such Participant's Frozen Vesting Account shall not be less than the nonforfeitable percentage thereof as of the end of the last Plan Year for which the Plan was a Top-Heavy Plan; and

(2) if such Participant has credit for at least 3 Vesting Years (5 Vesting Years with respect to Participants who do not have credit for any Service on or after January 1, 1989) as of the end of the last Plan Year for which the Plan is a Top-Heavy Plan, then the vesting schedule in (a) above shall continue to apply to such Participant.

13.4 Limitations on Benefits. If a Limitation Year beginning before January 1, 2000 contains any portion of a Plan Year for which the Plan is a Top-Heavy Plan, then, for purposes of the computation of the Defined Benefit Plan Fraction and the Defined Contribution Plan Fraction under Article 5, "1.0" shall be substituted for "1.25"; provided however, any limitation which results from the application of this sentence may be exceeded so long as there are no Defined Benefit Plan accruals for the individual and no employer contributions, forfeitures, or voluntary nondeductible contributions allocated to the individual; and provided further, this sentence shall not apply if the sum of the Key Employees' benefits from all Defined Benefit Plans and Defined Contribution Plans does not exceed 90 percent of the total of all Participants' benefits and if the Plan would satisfy the requirements of Section 13.2 if "4 percent" were substituted for "3 percent" and "7-1/2 percent" were substituted for "5 percent".

ARTICLE 14

MISCELLANEOUS

14.1 Construction.

(a) Article and Section References. Except as otherwise indicated by the context, all references to Articles or Sections in the Plan refer to Articles or Sections of the Plan. The titles thereto are for convenience of reference only and the Plan shall not be construed by reference thereto.

(b) Gender and Number. As used in the Plan, except when otherwise indicated by the context, the genders of pronouns and the singular and plural numbers of terms shall be interchangeable.

14.2 Assignment or Alienation of Benefits.

(a) General. Except as provided in (b) below and section 401(a)(13)(C) of the Code, benefits provided under the Plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. Except as provided in the foregoing, if any attempt shall be made to reach the beneficial interest of any Participant or beneficiary by legal process not preempted by ERISA, the Administrator may suspend any rights of distribution which any Participant or beneficiary may have, and may direct that such person's beneficial interest hereunder be paid over or applied for the benefit of such person, or for the benefit of dependents of such person, as the Administrator shall determine.

(b) QDRO.

(1) General. Notwithstanding (a) above, benefits shall be paid in accordance with the applicable requirements of any domestic relations order which is a qualified domestic relations order (as defined in section 206(d) of ERISA or section 414(p) of the Code); and provided further that benefits shall be paid pursuant to any domestic relations order entered before January 1, 1985 if either the Plan is paying benefits pursuant to such order on such date or the Administrator elects to treat such order as a qualified domestic relations order.

(2) Immediate Single Sum Distribution. If a qualified domestic relations order so provides, the Alternate Payee's entire benefit shall be paid as soon as administratively feasible after the Administrator's receipt of the order, determination of its qualified status and determination of the amount payable thereunder. Otherwise, payment shall be made only at such time as the Participant's benefit would otherwise be payable or as provided in section 414(p) of the Code.

(3) Alternate Payee's Beneficiary. In the event an Alternate Payee who is entitled to a benefit hereunder pursuant to a qualified domestic relations order dies prior to the receipt of the entire benefit due, the Alternate Payee's remaining benefit shall be payable to the Alternate Payee's beneficiary designated in the order or on a form specified by the Administrator and received by the Administrator prior to the Alternate Payee's death. In the event there is no designated beneficiary to receive any such amount,

then such amount shall be payable to the estate of the Alternate Payee.

(4) Alternate Payee Defined. "Alternate Payee" shall have the meaning given in section 414(p)(8) of the Code.

14.3 Data.

(a) Obligation to Furnish. Each person who participates or claims benefits under the Plan shall furnish to the Administrator, any trustee, or any insurance company involved in the funding of the benefits under the Plan, such signatures, documents, evidence, or information as the Administrator, such trustee, or such insurance company shall consider necessary or desirable for the purpose of administering the Plan.

(b) Mistakes or Misstatements. In the event of a mistake or a misstatement as to any item of such information, as is furnished pursuant to (a) above, which has an effect on the amount of benefits to be paid under the Plan, or in the event of a mistake or misstatement as to the amount of payments to be made to a person entitled to receive a benefit under the Plan, the Administrator shall cause such amounts to be withheld or accelerated, as shall in its judgment accord to such person the payment to which he is properly entitled under the Plan.

14.4 Employment Relationship.

(a) No Enlargement of Rights. Except as otherwise provided by law or legally enforceable contract, the establishment of the Plan or of any fund or any insurance contract thereunder, any amendment

of the Plan, participation in the Plan, or the payment of any benefits under the Plan, shall not be construed as giving any person whomsoever any legal or equitable claims or rights against any Employer, or its officers, directors, or shareholders, as such, or as giving any person the right to be retained in the employment of any Employer.

(b) Employer's Rights. The right of an Employer to discipline or discharge an employee shall not be affected by reason of any of the provisions of the Plan.

14.5 Merger or Transfer of Plan Assets. In the case of any merger or consolidation of the Plan with, or transfer of assets or liabilities of the Plan to, any other plan, each Participant in the Plan shall (if the surviving plan terminated immediately after the merger, consolidation, or transfer) be entitled to receive a benefit which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the Plan had then terminated).

14.6 Incompetency or Disability. Each person to whom a distribution is payable under the Plan shall be conclusively presumed to be mentally competent and not under a disability that renders him unable to care for his affairs, until the date on which the Administrator receives a written notice, in a form and manner acceptable to the Administrator, indicating that a guardian, conservator, or other party legally vested with the care of the person or the estate of such person has been appointed by a court of competent jurisdiction, and any payment of a distribution due thereafter shall be made to the same, provided that

proper proof of his appointment and continuing qualification is furnished in a form and manner acceptable to the Administrator. The Administrator shall not be required to look to the application of any such payment so made.

14.7 Nontransferability of Annuities. Any annuity contract distributed from the Plan must be nontransferable.

14.8 USERRA. Notwithstanding any provision of the Plan to the contrary, effective December 12, 1994, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with Section 414(u) of the Code.

14.9 Governing Law. The Plan and all rights and duties under the Plan shall be governed, construed and administered in accordance with the laws of the State of Ohio, except as governed separately by or preempted by federal law.

14.10 Severability. In case any provision of this Plan shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of this Plan, and this Plan shall be construed and interpreted as if such illegal or invalid provision had never been a part of it.

IN WITNESS WHEREOF, FIFTH THIRD BANK has caused this Plan, as supplemented by the Appendices hereto, to be executed this 28 day of December, 2001.

JA 411

FIFTH THIRD BANK

By: /s/Paul L. Reynolds

903,796.1

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX I

PREDECESSOR EMPLOYER INDEX

Service crediting and/or other substantive provisions are applicable with respect to the following predecessor employers in the Appendices indicated:

Predecessor Employer	Service Crediting under Appendix	Other Substantive Provisions under Appendix
ACI Merchant Services, Inc.	II	
Bank of Ashland (and affiliates)	II	
Bank One, National Association	II	
Boone State Bank	IV	IV
Capital Holdings, Inc. (and Capital Bank, N.A.)	II	
CitFed Bancorp, Inc. (and subsidiaries)	XIV	XIV
Citizens Heritage Bank, National Association	II	
CNB Bancshares, Inc. (and Civitas Bank and other subsidiaries)	XVI	XVI
Commercial National Bank	II	II

Predecessor Employer	Service Crediting under Appendix	Other Substantive Provisions under Appendix
Cumberland Federal Savings Bank	VII	VII
Decatur County Bank	II	
Enterprise Federal Savings Bank (and Enterprise Federal Bancorp, Inc.)	XV	XV
Falls Savings Bank, FSB	IX	IX
First-Mason Bank	III	III
First Nationwide Bank, a Federal Savings Bank (fka California Federal)	XI	XI
First Ohio Bancshares, Inc. (and First National Bank of Toledo and other subsidiaries)	VI	VI
Gateway Leasing Corporation	II	
Great Lakes National Bank, Ohio, N. A.	II	
Heartland Capital Management, Inc.	II	
Integrated Delivery Technologies, Inc.	II	

Predecessor Employer	Service Crediting under Appendix	Other Substantive Provisions under Appendix
Kentucky Enterprise Bank, FSB (and Kentucky Enterprise Bancorp, Inc.)	II	
Mutual Federal Savings Bank	VIII	VIII
NBD Bancorp, Inc.	X	X
New Palestine Bank	V	V
The Ohio Company (and subsidiaries)	XII	XII
Old Kent Financial Corporation (and subsidiaries)	XVIII	XVIII
Ottawa Financial Corporation (and AmeriBank)	XVII	XVII
Peoples Bank Corporation of Indianapolis (and subsidiaries)	II	
Resource Management, Inc. (dba Maxus Investment Group)	II	
South Florida Bank (and South Florida Bank Holding Corporation)	II	

Predecessor Employer	Service Crediting under Appendix	Other Substantive Provisions under Appendix
State Savings Bank (and affiliates)	XIII	XIII
Strongsville Savings Bank (and Emerald Financial Corp)	II	
USB, Inc.	XIX	XIX
Vanguard Financial Company	II	
W. Lyman Case & Company	II	

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX II

Service Crediting for Certain Predecessor Employers

1. **Predecessor Employers**. The crediting of Service under this Appendix shall apply only to those Employees described below.

(a) **CITIZENS HERITAGE BANK, NATIONAL ASSOCIATION**. Employees of Citizens Heritage Bank, National Association ("Citizens") who became Employees on March 31, 1988 in connection with Citizens' adoption of the Old Plan on that date shall be credited with Service under Section 2.43 of the Plan for their service with Citizens.

(b) **COMMERCIAL NATIONAL BANK**. Employees of Commercial National Bank ("Commercial") who became Employees on or before August 1, 1988 in connection with the merger of Commercial into the Fifth Third Bank of Northwestern Ohio, National Association, shall be credited with Service under Section 2.43 of the Plan for their service with Commercial.

(c) **DECATUR COUNTY BANK**. Employees of Decatur County Bank ("Decatur") who became Employees on September 23, 1988 in connection with Decatur County Bank's adoption of the Plan, shall be credited with

Service under Section 2.43 of the Plan for their service with Decatur.

(d) **KENTUCKY ENTERPRISE BANK, FSB**. Employees of Kentucky Enterprise Bank, FSB and Kentucky Enterprise Bancorp, Inc. who became Employees on or before March 15, 1996 in connection with the merger of Kentucky Enterprise Bancorp, Inc. into Fifth Third Bancorp shall be credited with Service under Section 2.43 of the Plan for their service with Kentucky Enterprise Bank, FSB and Kentucky Enterprise Bancorp, Inc.

(e) **GATEWAY LEASING CORPORATION, an Ohio Corporation**. Former employees of Gateway Leasing Corporation ("Gateway") who became Employees on or before June 7, 1997 in connection with The Fifth Third Leasing Company's Asset Purchase Agreement with Gateway shall be credited with Service under Section 2.43 of the Plan for their service with Gateway.

(f) **GREAT LAKES NATIONAL BANK, OHIO, N.A.** Former employees of Great Lakes National Bank, Ohio, N.A. ("Great Lakes") who became Employees on or before September 26, 1997 in connection with the Employer's acquisition of certain assets of Great Lakes shall be credited with Service under Section 2.43 of the Plan for their service with Great Lakes.

(g) **BANK ONE, NATIONAL ASSOCIATION**. Former employees of Bank One, National

Association ("Bank One") who became Employees on or before October 16, 1998 in connection with Fifth Third Bank of Southern Ohio's acquisition of certain assets of Bank One shall be credited with Service under Section 2.43 of the Plan for their service with Bank One.

(h) **BANK OF ASHLAND.** Employees of Ashland Bankshares, Inc. or Bank of Ashland, Inc. (a subsidiary of Ashland Bankshares, Inc.) who became Employees on or before April 16, 1999 in connection with the merger of Bank of Ashland, Inc. and Fifth Third Bank, Ohio Valley, shall be credited with Service under Section 2.43 of the Plan for their service with Ashland Bankshares, Inc. or Bank of Ashland, Inc.

(i) **SOUTH FLORIDA BANK AND SOUTH FLORIDA BANK HOLDING CORPORATION**. Employees of South Florida Bank or South Florida Bank Holding Corporation who became Employees of an Employer as a result of the mergers of South Florida Bank into Fifth Third Bank, Florida or South Florida Bank Holding Corporation into Fifth Third Bancorp and who were Employees of an Employer on the first business day after the Effective Time shall be credited with Service under Section 2.43 of the Plan for their service with South Florida Bank or South Florida Bank Holding Corporation.

(j) **STRONGSVILLE SAVINGS BANK AND EMERALD FINANCIAL CORP.** Employees of The Strongsville Savings Bank or Emerald Financial Corp., who became Employees of an Employer as a result of the mergers of The Strongsville Savings Bank into Fifth Third Bank, Northwestern Ohio N.A. or Emerald Financial Corporation into Fifth Third Bancorp and who were Employees of an Employer on the first business day after August 6, 1999, shall be credited with Service under Section 2.43 of the Plan for their service with The Strongsville Savings Bank and Emerald Financial Corp.

(k) **ACI MERCHANT SERVICES, INC.** Employees of ACI Merchant Services, Inc. ("ACI") who became Employees on October 2, 2000 in connection with the merger of ACI into Midwest Payment Systems, Inc. shall be credited with Service under Section 2.43 of the Plan for their service with ACI.

(l) **PEOPLES BANK CORPORATION OF INDIANAPOLIS.** Each Peoples Bank Employee who was an Employee of an Employer on January 1, 2000 (and who was an employee of any subsidiary of Fifth Third Bancorp on the first business day after the merger of Peoples Bank Corporation of Indianapolis into Fifth Third Bancorp), shall be credited with Service under Section 2.43 of the Plan for his service with Peoples Bank Corporation of Indianapolis, Peoples Bank &

Trust Company and any other subsidiary of Peoples Bank Corporation of Indianapolis. "Peoples Bank Employee" means an individual who, immediately prior to the merger of Peoples Bank Corporation of Indianapolis into Fifth Third Bancorp, was employed by Peoples Bank Corporation of Indianapolis, or any subsidiary of Peoples Bank Corporation of Indianapolis.

(m) **HEARTLAND CAPITAL MANAGEMENT, INC.** Individuals who were Employees of Heartland Capital Management, ("Heartland") on February 4, 2000 became Participants on February 4, 2000. In addition to the Service credited under Section 2.43 for the period that Heartland has been an Affiliate, each individual who was an Employee of Heartland on February 4, 2000 (and who was an employee of Heartland on the first business day after the day Heartland became an Affiliate) shall be credited with Service under Section 2.43 of the Plan for his service with Heartland prior to its having become an Affiliate.

(n) **INTEGRATED DELIVERY TECHNOLOGIES, INC.** Employees of Integrated Delivery Technologies, Inc. who become Employees as of the effective time of the merger of Integrated Delivery Technologies, Inc. and Midwest Payment Systems East, Inc. in connection with such merger, shall be credited with Service under

Section 2.43 of the Plan for their service with Integrated Delivery Technologies, Inc.

(o) **RESOURCE MANAGEMENT, INC. (dba MAXUS INVESTMENT GROUP).** Employees of Resource Management, Inc. or any of its subsidiaries, who became Employees on January 2, 2001 in connection with the merger of Resource Management, Inc, into Fifth Third Bancorp shall be credited with Service under Section 2.43 of the Plan for their service with Resource Management, Inc. or its subsidiaries.

(p) **CAPITAL HOLDINGS, INC.** Employees of Capital Holdings, Inc. or Capital Bank, N.A. who became Employees on or before the effective time of the merger of Capital Holdings, Inc. and Fifth Third Bancorp (i.e., the close of business on March 9, 2001) in connection with such merger, shall be credited with Service under Section 2.43 of the Plan for their service with Capital Holdings, Inc. or Capital Bank, N.A.

(q) **W. LYMAN CASE & COMPANY.** Employees of W. Lyman Case & Company ("WLC") who became Employees on the date WLC became an Affiliate of Fifth Third Bank in connection with such affiliation, shall be credited with Service under Section 2.43 of the Plan for their service with WLC for the period prior to the date WLC became an Affiliate of Fifth Third Bank.

(r) **VANGUARD FINANCIAL COMPANY.** Employees of Vanguard Financial Company who became Employees as of the effective time of the merger of Vanguard Financial Company into Fifth Third Bancorp, shall be credited with Service under Section 2.43 of the Plan for their service with Vanguard prior to such merger.

2. **Crediting of Service.** Service with the predecessor employers described in paragraph 1 above shall be credited to such Employees specified in paragraph 1 above under rules comparable to those under Section 2.43 of the Plan.

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX III

THE FIRST-MASON BANK EMPLOYEES' PROFIT SHARING PLAN

Effective December 31, 1982, The First-Mason Bank Employees' Profit Sharing Plan (the "First-Mason Plan") was merged into the Plan. The First-Mason Plan, as in effect prior to January 29, 1982, is a Predecessor Plan such that service taken into account under The First-Mason Plan shall count as Service under Section 2.43 under this Plan.

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX IV

BOONE STATE BANK
PROFIT SHARING PLAN

1. Predecessor Plan. Effective December 31, 1986 (the "Merger Date"), the Boone State Bank Profit Sharing Plan (the "Boone State Plan") was merged into the Plan. The Boone State Plan is a Predecessor Plan such that service taken into account under the Boone State Plan shall count as Service under Section 2.43 under this Plan.

2. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Boone State Plan shall be separately accounted for under the Plan. A Participant shall have a Boone State Account which, as of the Merger Date, shall be equal to his account under the Boone State Plan as of such date. A Participant's Boone State Account shall be adjusted in accordance with Article 7 and shall be subject to the vesting provisions of the Plan. A Participant's Boone State Account shall not share in any contributions or forfeitures allocated under the Plan on or after the Merger Date.

3. Investment of Boone State Account. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Boone State Account.

(a) Additional Optional Form. Subject to Sections 8.5(e) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1 of the

Plan, a Participant entitled to a distribution prior to December 31, 2002 may elect to have his Boone State Account paid in the form of a Qualified Joint and Survivor Annuity. This form is not available for distributions commencing on or after December 31, 2002.

(b) Definition of Qualified Joint and Survivor Annuity.

(1) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse. The Participant may elect to receive a smaller annuity benefit with continuation of payments to the spouse at a rate of seventy-five percent (75%) or one hundred percent (100%) of the rate payable to the Participant during his lifetime.

(2) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(3) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable Boone State Account balance.

(c) Waiver.

(1) Election Period. A Participant who has otherwise elected to have his Boone State Account paid as a Qualified Joint and Survivor Annuity may later waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(2) Revocation. A Participant may also revoke any waiver under (1) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(3) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(A) the terms and conditions of the Qualified Joint and Survivor Annuity,

(B) the Participant's right to make, and the effect of, an election under (1) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(C) the rights of the Participant's spouse under (4) below,

(D) the right to make, and the effect of, a revocation of an election under (1) above, and

(E) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(4) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(i) acknowledges the effect of such election,

(ii) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(iii) for waivers made in Plan Years beginning after December 31, 1986, acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and

Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(iv) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(ii) and (iii) above executed after October 21, 1986 must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

4. Preretirement Survivor Annuity.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, the Participant elects payments of his Boone State Account in the form of a life annuity;

(3) such Participant has a nonforfeitable right to any portion of his Boone State Account;

(4) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(5) payment of the Preretirement Survivor Annuity commences before December 31, 2002.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of 50 percent of the Participant's nonforfeitable Boone State Account balance as of the date of his death, whether vested before or upon death and including the proceeds of any insurance contracts, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse.

(c) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(1) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity does not exceed $5,000 and such payment is made before payment otherwise begins; or

(2) the Surviving Spouse elects in writing to receive the lump sum distribution, such election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public.

Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(d) Reduction of Other Death Benefits. In determining the amount of death payments otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity shall be subtracted from the amount otherwise determined.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

NEW PALESTINE BANK EMPLOYEES' 401(k) PLAN

APPENDIX V

1. Predecessor Plan. Effective December 31, 1989 (the "Merger Date"), the New Palestine Bank Employees' 401(k) Plan (the "New Palestine Plan") merged into the Plan. The New Palestine Plan is a Predecessor Plan such that service taken into account under the New Palestine Plan shall count as Service under Section 2.43 under this Plan.

2. Establishment of Special Account. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) a New Palestine Account in order to separately account for the portion of his Account attributable to part of his benefit under the New Palestine Plan. The New Palestine Account shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. Such subaccount shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan.

3. Accounting. Effective as of the Merger Date, amounts in a Participant's "Salary Savings Account," "Regular Account" and "Rollover Account" under the New Palestine Plan shall be reflected initially in the same Participant's Section 401(k) Salary Deferral Account, New Palestine Account and Rollover Account, respectively.

4. Investment of New Palestine Account. A Participant shall the Participant-directed investment rights provided in Section 7.1(c)(2) after the Plan over his New Palestine Account.

5. Vesting. A Participant's rights to his New Palestine Account shall be nonforfeitable at all times.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX VI

FIRST OHIO BANCSHARES, INC. STOCK PURCHASE, 401(k) AND SAVINGS PLAN

1. Predecessor Plan. Effective January 1, 1990, the First Ohio Bancshares, Inc. Stock Purchase, 401(k) and Savings Plan (the "First Ohio Plan") became a Predecessor Plan such that service taken into account under the First Ohio Plan shall count as Service under Section 2.43 under this Plan.

2. Establishment of Special Accounts. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) a "Toledo Matching Account" to the extent necessary to account for the trust-to-trust transfer from the Participant's "Employer Matching Contribution Account" (also known as his "Employer Contribution Account") under the First Ohio Plan. The foregoing subaccount shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. Such subaccount shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan.

3. Trust-to-Trust Transfers. Under the applicable provisions of the Old Plan, trust-to-trust transfers were made on behalf of certain Participants from the First Ohio Plan to the Plan with the transfers reflected in the appropriate subaccounts under the Plan.

4. Distribution of Employer Stock. Notwithstanding anything to the contrary contained in

the Plan, to the extent a Participant has Accounts in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock represented by his interest in the Fifth Third Stock Fund distributed to him in any withdrawal or distribution to which he is entitled under the Plan.

5. Investment Elections. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Toledo Matching Account.

6. Vesting. A Participant's rights to his Toledo Matching Account shall be nonforfeitable at all times.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX VII

FINANCIAL INSTITUTIONS THRIFT PLAN, AS ADOPTED BY THE CUMBERLAND FEDERAL SAVINGS BANK

1. Predecessor Plan. Effective August 27, 1994, the Financial Institutions Thrift Plan, as adopted by The Cumberland Federal Savings Bank ("The Cumberland Plan"), became a Predecessor Plan such that service taken into account under the Cumberland Plan shall count as Service under Section 2.43 under this Plan.

2. Establishment of Special Accounts. There shall be maintained for each Participant (in addition to the subaccounts referred to in Sections 2.1 of the Plan) such of the following subaccounts as are necessary in order to separately account for the trust-to-trust transfers from The Cumberland Plan.

(a) a "Cumberland Regular Account" which is attributable to a transfer from the Participant's "Regular Account" under The Cumberland Plan, as adjusted in accordance with Article 7.

(b) a "Cumberland 401(k) Account," which is attributable to a transfer from the Participant's "401(k) Account" under The Cumberland Plan, as adjusted in accordance with Article 7.

(c) a "Cumberland Rollover Account," which is attributable to a transfer from the Participant's "Rollover Account" under The Cumberland Plan as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. A Participant's Cumberland 401(k) Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Trust-to-Trust Transfers. In accordance with the terms of The Cumberland Plan and as directed by the Administrator, certain Participants with accounts in The Cumberland Plan elected to transfer those accounts and related plan assets to this Plan to be reflected in the appropriate subaccounts referred to in 2 above; provided however, the Plan did not accept a transfer of plan loans.

4. Investment of Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Cumberland Regular Account, Cumberland 401(k) Account and Cumberland Rollover Account.

5. Vesting. A Participant's rights to his Cumberland Regular Account, Cumberland 401(k) Account and Cumberland Rollover Account shall be nonforfeitable at all times.

6. Withdrawals.

(a) Cumberland 401(k) Account. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), or after attainment of age 59-1/2, he may withdraw from his Cumberland 401(k) Account (in the case of a hardship withdrawal, excluding earnings and excluding qualified nonelective contributions). Hardship withdrawals shall be governed by Section 8.1 of the Plan.

(b) Other Withdrawals. Subject to Section 8.6 of the Plan and (a) above with respect to the Participant's Cumberland 401(k) Account, a Participant shall have the right to elect to withdraw any part or all of his Cumberland 401(k) Account, Cumberland Regular Account and Cumberland Rollover Account. Only one withdrawal under this paragraph (b) may be made in any Plan Year quarter. An election to withdraw shall be governed by Section 8.2 of the Plan.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX VIII

MUTUAL FEDERAL SAVINGS BANK RETIREMENT SAVINGS PLAN

1. Predecessor Plan. Effective as of the date the Administrator determined (the "Merger Date"), the Mutual Federal Savings Bank Retirement Savings Plan merged into the Plan. The Mutual Federal Savings Bank Retirement Savings Plan (the "Mutual Federal Plan") is a Predecessor Plan such that service taken into account under the Mutual Federal Plan shall count as Service under Section 2.43 under this Plan.

2. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Mutual Federal Plan shall be separately accounted for under the Plan. A Participant shall have a Mutual Federal Account which, as of the Merger Date, shall be equal to his "Account" under the Mutual Federal Plan as of such date. A Participant's Mutual Federal Account shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be maintained for each Participant (in addition to the subaccounts referred to in Sections 2.1 of the Plan) such of the following subaccounts of his Mutual Federal Account as are necessary in order to separately account for the merger of the Mutual Federal Plan into the Plan:

(a) a "Mutual Federal Discretionary Contribution Account" which is attributable to any discretionary employer contributions and forfeitures allocated to the Participant under the Mutual Federal Plan, as adjusted in accordance with Article 7.

(b) a "Mutual Federal 401(k) Account," which is attributable to a Participant's "Elective Deferral Contributions" under the Mutual Federal Plan, as adjusted in accordance with Article 7.

(c) a "Mutual Federal Matching Contribution Account," which is attributable to any "Matching Contributions" allocated to the Participant under the Mutual Federal Plan, as adjusted in accordance with Article 7.

(d) a "Mutual Federal Rollover Account," which is attributable to a Participant's "Rollover Contributions" (if any) under the Mutual Federal Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. A Participant's Mutual Federal 401(k) Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Investment Elections. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire Mutual Federal Account (including each of its subaccounts).

4. Vesting. A Participant's rights to his Mutual Federal Account (including each of its subaccounts) shall be nonforfeitable at all times.

5. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his Mutual Federal 401(k) Account (excluding earnings) and his Mutual Federal Rollover Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan.

6. Forms of Payment. Subject to Sections 8.5(e) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1 of the Plan, a Participant entitled to a distribution prior to December 31, 2002 may elect to have his Mutual Federal Account paid in one or more of the forms described below. These forms are not available for distributions commencing on or after December 31, 2002.

(a) Full Cash Refund Annuity Option.

(1) Under the full cash refund annuity option, a Participant shall be entitled to a monthly benefit commencing as of his benefit commencement date and terminating with the monthly payment due on the first day of the month in which his death occurs.

(2) Upon such Participant's death, on or after his benefit commencement date, a contingent benefit shall be payable to the Beneficiary designated by him at the time he elects this option (if any), if such Beneficiary is then living.

(3) Such contingent benefit (if elected by the Participant) shall commence as of the first day of the month next following the calendar month in which the death of such Participant occurs and shall terminate with the monthly payment due on the first

day of the month in which the death of his designated Beneficiary occurs.

(4) The monthly amount of contingent benefit payable to such Participant's designated Beneficiary shall be equal to 50 percent, 66-2/3 percent or 100 percent as the Participant may elect, of the monthly benefit payable under this option to such Participant during the joint lives of him and such designated Beneficiary.

(5) Upon the death of the designated contingent annuitant (if any) or upon the death of the Participant if he has not designated a contingent annuitant, the lump sum actuarial equivalent (as of his benefit commencement date) of his benefit under the Plan over the aggregate amount of benefit payments received by him shall be payable in a lump sum to his Beneficiary.

(b) Life-Term Certain Option. Under the life-term certain option, a Participant shall be entitled to a monthly benefit commencing as of his benefit commencement date, payable during his remaining lifetime; provided that if such Participant dies on or after his benefit commencement date and before he has received 60, 120 or 180 monthly payments, which number of monthly payments shall be specified by him at the time he elects this option, then such specified number of monthly payments shall be continued in the same amount to his designated Beneficiary or Beneficiaries until the aggregate number of such payments made to such Participant and such Beneficiary or Beneficiaries equals such specified number of monthly payments.

(c) Single Life Annuity. Under the single life annuity option, a Participant shall be entitled to a monthly benefit commencing as of his benefit commencement date and continuing until the payment of the installment due on the first day of the month in which he dies.

(d) Qualified Joint and Survivor Annuity.

(1) Automatic Form of Payment. The form of payment of a Participant's Mutual Federal Account shall be a Qualified Joint and Survivor Annuity (defined in (2) below) if:

(A) the Participant elects payment of benefits in the form of a life annuity, and

(B) the Participant has not waived such Annuity pursuant to (3) below.

(2) Definition of Qualified Joint and Survivor Annuity.

(A) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse.

(B) Single Participant. For a Participant who is not married, "Qualified Joint and

Survivor Annuity" means an immediate annuity for the life of the Participant.

(C) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable Mutual Federal Account balance.

(3) Waiver.

(A) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. A Participant may also revoke any waiver under (A) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(C) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(i) the terms and conditions of the Qualified Joint and Survivor Annuity,

(ii) the Participant's right to make, and the effect of, an election under (A) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of the Participant's spouse under (4) below,

(iv) the right to make, and the effect of, a revocation of an election under (B) above, and

(v) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(4) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(i) acknowledges the effect of such election,

(ii) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits

designations by the Participant without any requirement of further consent by the spouse),

(iii) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(iv) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(ii) and (iii) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

7. Preretirement Survivor Annuity.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, the Participant elects payments of his Mutual Federal Account in the form of a life annuity;

(3) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(4) payment of the Preretirement Survivor Annuity commences before December 31, 2002.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of 100 percent of the Participant's nonforfeitable Mutual Federal Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse.

(c) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(1) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity

does not exceed $5,000 and such payment is made before payment otherwise begins; or

(2) the Surviving Spouse elects in writing to receive the lump sum distribution, such election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public.

Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(d) Reduction of Other Death Benefits. In determining the amount of death benefits otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity shall be subtracted from the amount otherwise determined.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX IX

FALLS SAVINGS BANK, FSB SALARY SAVINGS PLAN

1. Predecessor Plan. Effective as of April 30, 1996 (the "Merger Date"), the Falls Savings Bank, FSB Salary Savings Plan (the "Fall Savings Plan") merged into the Plan. The Falls Savings Plan is a Predecessor Plan such that service taken into account under the Falls Savings Plan shall count as Service under Section 2.43 under this Plan.

2. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Falls Savings Plan shall be separately accounted for under the Plan. A Participant shall have a Falls Savings Account which, as of the Merger Date, shall be equal to his "Account" under the Falls Savings Plan as of such date. A Participant's Falls Savings Account shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be established for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his Falls Savings Account as are necessary in order to separately account for the merger of the Falls Savings Plan into the Plan:

(a) a "Falls Savings Discretionary Contribution Account" which is attributable to any discretionary employer contributions allocated to the

Participant under the Falls Savings Plan, as adjusted in accordance with Article 7.

(b) a "Falls Savings 401(k) Account," which is attributable to a Participant's "Elective Contributions" under the Falls Savings Plan, as adjusted in accordance with Article 7.

(c) a "Falls Savings Rollover Account," which is attributable to a Participant's "Rollover Contributions" (if any) under the Falls Savings Plan, as adjusted in accordance with Article 7.

(d) a "Falls Savings Matching Contribution Account," which is attributable to any "Matching Contributions" allocated to the participant under the Falls Savings Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. A Participant's Falls Savings 401(k) Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Investment of Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire Falls Savings Account (including each of its subaccounts).

4. Vesting. A Participant's rights to his Falls Savings Account (including each of its subaccounts) shall be nonforfeitable at all times.

5. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his

Falls Savings 401(k) Account (excluding earnings) and his Falls Savings Rollover Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan.

6. Forms of Payment. Subject to Sections 8.5(e) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1 of the Plan, a Participant entitled to a distribution before December 31, 2002 may elect to have his Falls Savings Account paid in one or more of the forms described below. These forms are not available for distributions commencing on or after December 31, 2002.

(a) Single Life Annuity. Under the single life annuity option, a Participant shall be entitled to a monthly benefit commencing as of his benefit commencement date and continuing until the payment of the installment due on the first day of the month in which he dies.

(b) Qualified Joint and Survivor Annuity.

(1) Automatic Form of Payment. The form of payment of a Participant's Falls Savings Account shall be a Qualified Joint and Survivor Annuity (defined in (2) below) if:

(A) the Participant elects payment of benefits in the form of a life annuity, and

(B) the Participant has not waived such Annuity pursuant to (3) below.

(2) Definition of Qualified Joint and Survivor Annuity.

(A) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half (50%), seventy-five percent (75%) or one-hundred percent (100%) (as elected by the Participant) of the annuity payable during the joint lives of the Participant and such spouse.

(B) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(C) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable Falls Savings Account balance.

(3) Waiver.

(A) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. A Participant may also revoke any waiver under (A) above during the

election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(C) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(i) the terms and conditions of the Qualified Joint and Survivor Annuity,

(ii) the Participant's right to make, and the effect of, an election under (A) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of the Participant's spouse under (4) below,

(iv) the right to make, and the effect of, a revocation of an election under (B) above, and

(v) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(4) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(i) acknowledges the effect of such election,

(ii) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(iii) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(iv) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(ii) and (iii) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(c) Another Form of Annuity. The Participant may elect the purchase of a different form of annuity. Such annuity may not be in any form that will provide for payments over a period extending beyond either the life of the Participant (or the lives of the Participant and his designated Beneficiary) or the life expectancy of the Participant (or the life expectancy of the Participant and his designated Beneficiary).

7. Preretirement Survivor Annuity.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, the Participant elects payments of his Falls Savings Account in the form of a life annuity;

(3) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(4) payment of the Preretirement Survivor Annuity commences before December 31, 2002.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of 100 percent of the Participant's nonforfeitable Falls Savings Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse.

(c) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(1) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity does not exceed $5,000 and such payment is made before payment otherwise begins; or

(2) the Surviving Spouse elects in writing to receive the lump sum distribution, such election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public. Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(d) Reduction of Other Death Benefits. In determining the amount of death benefits otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity

shall be subtracted from the amount otherwise determined.

8. Loans. Except to the extent permitted by Section 7.6 of the Plan, a Participant shall not be permitted to borrow from his Falls Savings Account. Any defaulted loans previously treated as a taxable distribution under Section 72(p) of the Code shall continue to be held in the Participant's Falls Savings Account until a distributable event under the Plan occurs.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX X

NBD BANCORP, INC. EMPLOYEES' SAVINGS AND INVESTMENT PLAN

1. Predecessor Plan. Upon the transfer referred to in paragraph 3 below, the NBD Bancorp, Inc. Employees' Savings and Investment Plan (the "NBD Plan") became a Predecessor Plan solely with respect to each Participant who had amounts transferred from the NBD Plan to this Plan pursuant to paragraph 3 below such that service taken into account under the NBD Plan for such Participants shall count as Service under Section 2.43 under this Plan.

2. Accounting. There shall be established for the Participants specified below (in addition to the subaccounts referred to in Section 2.1 of the Plan) an "NBD Account" and such of the respective following subaccounts of the NBD Account as are necessary in order to separately account for the trust-to-trust transfers described in paragraph 3 below:

(a) an "NBD Participant Contribution Account" which is attributable to a transfer from the Participant's "Participant Contribution Account" under the NBD Plan, as adjusted in accordance with Article 7.

(b) an "NBD Matching Contribution Account" which is attributable to a transfer from the Participant's "Matching Contribution Account" under the NBD Plan, as adjusted in accordance with Article

7. In addition, for John McCreary, that part of his account under the NBD Plan which is subject to Appendix O, paragraphs B and C of the NBD Plan (as that plan was written as of the date hereof) shall be reflected in the NBD Matching Contribution Account.

(c) an "NBD Rollover Account" which is attributable to a transfer from the Participant's "Rollover Account" under the NBD Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan. A Participant's NBD Participant Contribution Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Trust-to-Trust Transfers. As of the transfer date determined by the Administrator, Participants who were Employees of an Employer on such transfer date and who had accounts in the NBD Plan had have those accounts and related plan assets transferred to this Plan to be reflected in the appropriate subaccounts referred to in 2 above; provided, however, the Plan did not accept a transfer of plan loans.

4. Investment of Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire NBD Account (including each of its subaccounts).

5. Vesting. A Participant's rights to his NBD Account (including each of its subaccounts) shall be nonforfeitable at all times.

6. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his NBD Participant Contribution Account (excluding earnings) and his NBD Rollover Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan.

7. Withdrawals. Upon attainment of age 59-1/2, a Participant shall have the right to withdraw any part or all of his NBD Account.

8. Forms of Payment. Subject to Sections 8.5(e) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1 of the Plan, a Participant entitled to a distribution prior to December 31, 2002, may elect to have his NBD Account paid in one or more of the forms described below. These forms are not available for distributions commencing on or after December 31, 2002.

(a) Nontransferable Annuity Contract Option. Under the nontransferable annuity contract option, a Participant shall be entitled to a nontransferable annuity contract, either fixed or variable, from an insurance company or other issuer and containing such terms and options as the Participant shall direct on a form to be supplied to him for that purpose.

(b) Qualified Joint and Survivor Annuity.

(1) Automatic Form of Payment. The form of payment of a Participant's NBD Account shall be a Qualified Joint and Survivor Annuity (defined in (2) below) if:

(A) the Participant elects payment of benefits in the form of a life annuity, and

(B) the Participant has not waived such Annuity pursuant to (3) below.

(2) Definition of Qualified Joint and Survivor Annuity.

(A) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is either fifty percent (50%) or one hundred percent (100%) (as elected by the Participant) of the annuity payable during the joint lives of the Participant and such spouse.

(B) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(C) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable NBD Account balance.

(3) Waiver.

(A) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his

benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. A Participant may also revoke any waiver under (A) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(C) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(i) the terms and conditions of the Qualified Joint and Survivor Annuity,

(ii) the Participant's right to make, and the effect of, an election under (A) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of the Participant's spouse under (4) below,

(iv) the right to make, and the effect of, a revocation of an election under (B) above, and

(v) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(4) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(i) acknowledges the effect of such election,

(ii) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(iii) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(iv) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent

required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(ii) and (iii) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

9. Preretirement Survivor Annuity.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, the Participant elects payments of his NBD Account in the form of a life annuity;

(3) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(4) payment of the Preretirement Survivor Annuity commenced before December 31, 2002.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of 100 percent of the Participant's nonforfeitable NBD Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse.

(c) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(1) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity does not exceed $5,000 and such payment is made before payment otherwise begins; or

(2) the Surviving Spouse elects in writing to receive the lump sum distribution, such election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public. Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(d) Reduction of Other Death Benefits. In determining the amount of death benefits otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity

shall be subtracted from the amount otherwise determined.

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XI

CALIFORNIA FEDERAL EMPLOYEES' INVESTMENT PLAN

1. Past Service Credit. Upon the transfer referred to in paragraph 3 below from the California Federal Employees' Investment Plan (formerly known as the First Nationwide Employees' Investment Plan) (the "Cal Fed Plan"), each Participant who had amounts transferred from the Cal Fed Plan to this Plan pursuant to paragraph 3 below was credited with Service under Section 2.43 of the Plan for the Participant's service with First Nationwide Bank, a Federal Savings Bank ("FNB"). Service with FNB shall be determined under rules comparable to those under Section 2.43 of the Plan. Solely for purposes of determining the level of matching contribution applicable to a Participant, effective January 1, 1997, each Participant who became an Employee of an Employer in connection with, and on the closing date of, the transactions contemplated by the Asset Purchase and Sale Agreement entered on September 22, 1995 by and between FNB and Fifth Third Bank of Northeastern Ohio, an Ohio Banking corporation, shall be credited with Service under Section 2.43 of the Plan for the Participant's service with FNB (determined under rules comparable to those under Section 2.43 of the Plan).

2. Accounting. There shall be established for the Participants specified below (in addition to the subaccounts referred to in Section 2.1 of the Plan) a

"Cal Fed Account" and such of the respective following subaccounts of the Cal Fed Account as are necessary in order to separately account for the trust-to-trust transfers from the Cal Fed Plan.

(a) a "Cal Fed Salary Deferral Account" which is attributable to a transfer from the Participant's "Salary Deferral Account" and "Prior Plan Salary Deferral Account," a subaccount of the Prior Plan Account, under the Cal Fed Plan, as adjusted in accordance with Article 7.

(b) a "Cal Fed Company Matching Account" which is attributable to a transfer from the Participant's "Company Matching Account" and "Prior Plan Matching Account," a subaccount of the Prior Plan Account, under the Cal Fed Plan, as adjusted in accordance with Article 7.

(c) a "Cal Fed Profit Sharing Account" which is attributable to a transfer from the Participant's "Profit Sharing Account" under the Cal Fed Plan, as adjusted in accordance with Article 7.

(d) a "Cal Fed Rollover Account" which is attributable to a transfer from the Participant's "Rollover Account" under the Cal Fed Plan, as adjusted in accordance with Article 7.

(e) a "Cal Fed After-Tax Account" which is attributable to a transfer from the Participant's "Prior Plan After-Tax Account," a subaccount of the Prior Plan Account under the Cal Fed Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's "Account" within the meaning

of Section 2.1 of the Plan. A Participant's Cal Fed Salary Deferral Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Trust-to-Trust Transfers. As of the transfer date determined by the Administrator, Participants who were Employees of an Employer on the fifth business day before the transfer date and who had accounts in the Cal Fed Plan had those accounts and related plan assets transferred to this Plan to be reflected in the appropriate subaccounts referred to in 2 above; provided, however, the Plan did not accept a transfer of plan loans

4. Vesting. A Participant's rights to his Cal Fed Account (including each of its subaccounts) shall be nonforfeitable at all times.

5. Withdrawals. Upon attainment of age 59-1/2, a Participant shall have the right to withdraw any part or all of his Cal Fed Account once per year.

6. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his Cal Fed Salary Deferral Account (excluding earnings) and his Cal Fed Rollover Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan.

7. Withdrawal from After-Tax Account. A Participant shall have the right to withdraw any part or all of his Cal Fed After-Tax Account once every two calendar years.

8. Investment of Accounts. A Participant shall have the Participant-directed investment rights provided in

Section 7.1(c)(2) of the Plan over his entire Cal Fed Account (including each of its subaccounts).

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XII

FIFTH THIRD/THE OHIO COMPANY AND FIFTH THIRD INSURANCE AGENCY CORPORATION

1. Past Service Credit.

(a) Ohio Company Employees. For purposes of this Appendix, "Ohio Company Employee" means an individual who, immediately prior to the effective time of the merger of The Ohio Company and Fifth Third Securities, Inc., was employed by The Ohio Company or any of its subsidiaries and who became an Employee as of the effective time of such merger. "Ohio Company Employee" also means an individual who would have met the foregoing criteria except for the fact that he became an Employee prior to the Adoption Date but in connection with the merger of The Ohio Company and Fifth Third Securities, Inc.

(b) Past Service Credit and Eligibility. Ohio Company Employees shall be credited with Service under Section 2.43 of the Plan for their service with The Ohio Company and any of its subsidiaries. Service with The Ohio Company and its subsidiaries shall be determined under rules comparable to those under Section 2.43 of the Plan. In no event shall there be any duplication of service for the same period.

2. Trust-to-Trust Transfer from The Ohio Company Profit Sharing Plan.

(a) Transfer. As of the transfer date determined by Fifth Third Bank, individuals who had "Accounts" in The Ohio Company Profit Sharing Plan had those Accounts and related plan assets, except for any portion in the "Individual Direction Fund" in The Ohio Company Profit Sharing Plan, transferred to this Plan. Upon such transfer, those individuals who were not already Participants (or Beneficiaries) and whose Accounts were transferred became Participants (or Beneficiaries).

(b) Accounting. There shall be maintained for each Participant (and Beneficiary) who had a transfer on his behalf under (a) above (in addition to the subaccounts referred to in Section 2.1 of the Plan) an "Ohio Company Profit Sharing Account." Transfers from Participants' "Profit Sharing Accounts" under The Ohio Company Profit Sharing Plan shall be reflected in the Participants' Ohio Company Profit Sharing Accounts under this Plan. A Participant's Ohio Company Profit Sharing Account shall be considered to be part of the Participant's "Account" within the meaning of Section 2.1 of the Plan and shall be adjusted in accordance with Article 7 of the Plan.

(c) Investment of Ohio Company Profit Sharing Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Ohio Company Profit Sharing Account.

(d) Vesting. A Participant's rights to his Ohio Company Profit Sharing Account shall be nonforfeitable at all times.

(e) Withdrawals at Age 65. Upon attainment of age 65, a Participant who has not terminated employment shall have the right to withdraw any part or all of his Ohio Company Profit Sharing Account.

3. Merger of The Ohio Company Salary Investment Plan into the Plan.

(a) Predecessor Plan. Effective as of July 1, 1999 (the "Merger Date"), The Ohio Company Salary Investment Plan merged into the Plan. The Ohio Company Salary Investment Plan is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 1 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. Upon the merger, an individual who was not already a Participant (or Beneficiary) but who has an Ohio Company SIP Account, became a Participant (or Beneficiary).

(b) Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under The Ohio Company Salary Investment Plan shall be separately accounted for under the Plan. A Participant shall have an Ohio Company SIP Account which, as of the Merger Date, shall be equal to his "Account" under The Ohio Company Salary Investment Plan as of such date. A Participant's Ohio Company SIP Account shall be adjusted in accordance with Article 7 and shall not share in any contributions

or forfeitures allocated under the Plan. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his Ohio Company SIP Account as are necessary in order to separately account for the merger of The Ohio Company Salary Investment Plan into the Plan:

(1) an "Ohio Company SIP 401(k) Account," which is attributable to a Participant's "Deferral Contributions" under The Ohio Company Salary Investment Plan, as adjusted in accordance with Article 7.

(2) an "Ohio Company SIP Rollover Account," which is attributable to a Participant's rollover contributions (if any) under The Ohio Company Salary Investment Plan, as adjusted in accordance with Article 7.

(3) an "Ohio Company SIP Matching Contribution Account," which is attributable to any "Matching Contributions" allocated to the participant under The Ohio Company Salary Investment Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's Ohio Company SIP 401(k) Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

(c) Investment of Ohio Company SIP Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire Ohio Company SIP Account (including each of its subaccounts).

(d) Vesting. A Participant's rights to his Ohio Company SIP Account (including each of its subaccounts) shall be nonforfeitable at all times.

(e) Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his Ohio Company SIP 401(k) Account (excluding earnings) and his Ohio Company SIP Rollover Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan.

(f) Other Withdrawals.

(1) Ohio Company SIP Matching Contribution Account Withdrawals. A Participant who has not terminated employment shall have the right to make withdrawals from his Ohio Company SIP Matching Contribution Account. A Participant may request such a withdrawal twice each Plan Year. The amount of such distribution may not be less than the lesser of (i) the balance of the Participant's distributable Ohio Company SIP Matching Contribution Account, or (ii) $500.

(2) Withdrawals After Age 59½. A Participant who has not terminated employment but who has withdrawn his Ohio Company SIP Matching Contribution Account shall have the right to make withdrawals from the nonforfeitable portion of his remaining Ohio Company SIP Account if he has reached age 59½. A Participant may request such a withdrawal twice each Plan Year. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Ohio Company SIP Account, or (b) $500.

(g) Loans. Except to the extent permitted by Section 7.6 of the Plan, a Participant shall not be permitted to borrow from his Ohio Company SIP Account. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of The Ohio Company Salary Investment Plan prior to the Merger Date.

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XIII

STATE SAVINGS BANK, CENTURY BANK AND STATE SAVINGS BANK. F.S.B.

1. Past Service Credit.

(a) State Savings Employees. For purposes of this Appendix, "State Savings Employee" means an individual who, immediately prior to June 19, 1998, was employed by State Savings Bank, Century Bank or State Savings Bank, F.S.B. and who became an Employee as of June 19, 1998. "State Savings Employee" also means an individual who would have met the foregoing criteria except for the fact that he became an Employee prior to June 19, 1998 but in connection with the acquisition of State Savings Company and subsidiaries by Fifth Third Bancorp.

(b) Past Service Credit and Eligibility. State Savings Employees shall be credited with Service under Section 2.43 of the Plan for their service with State Savings Company and any of its subsidiaries. Service with State Savings Company and its subsidiaries shall be determined under rules comparable to those under Section 2.43 of the Plan. In no event shall there be any duplication of service for the same period. Effective September 7, 2001, notwithstanding Section 6.1(f) of the Plan, Participant Katherine Roth's rights to her Account (and each of its subaccounts) shall be nonforfeitable at all times.

2. Merger of the State Savings Bank Profit Sharing Plan into the Plan.

(a) Merger Date. Effective as of October 1, 1999 (the "Merger Date"), the State Savings Bank Profit Sharing Plan (the "State Savings Plan") merged into the Plan. The State Savings Plan is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 1 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. Upon the merger, those individuals who were not already Participants (or Beneficiaries) but who have State Savings Accounts became Participants (or Beneficiaries).

(b) Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the State Savings Plan shall be separately accounted for under the Plan. A Participant shall have a State Savings Account which, as of the Merger Date, shall be equal to his "Account" under the State Savings Plan as of such date. A Participant's State Savings Account shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be established for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his State Savings Account as are necessary in order to separately account for the merger of the State Savings Plan into the Plan:

(1) a "State Savings Employee Pre-Tax Contribution Account," which is attributable to a Participant's "Employee Pre-Tax Contribution Account"

under the State Savings Plan, as adjusted in accordance with Article 7.

(2) a "State Savings Employer Matching Contribution Account," which is attributable to a Participant's "Employer Matching Contribution Account" under the State Savings Plan, as adjusted in accordance with Article 7.

(3) a "State Savings Employer Nonelective Contribution Account," which is attributable to a Participant's "Employer Nonelective Contribution Account" under the State Savings Plan, as adjusted in Accordance with Article 7.

(4) a "State Savings Employee After-Tax Contribution Account," which is attributable to a Participant's "Employee After-Tax Contribution Account" (if any) under the State Savings Plan, as adjusted in accordance with Article 7.

(5) a "State Savings Rollover Contribution Account," which is attributable to a Participant's "Rollover Contribution Account" (if any) under the State Savings Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's State Savings Employee Pre-Tax Contribution Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

(c) Investment of State Savings Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the

Plan over his entire State Savings Account (including each of its subaccounts).

(d) Vesting. A Participant's rights to his State Savings Account (including each of its subaccounts) shall be nonforfeitable at all times.

(e) Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw from his State Savings Employee Pre-Tax Contribution Account (excluding earnings) and his State Savings Rollover Contribution Account. Hardship withdrawals shall be governed by Section 8.1 of the Plan. Any hardship withdrawals shall be paid in a single sum consistent with Section 9.1(a) of the Plan.

(f) Other Withdrawals.

(1) State Savings Rollover Contribution Account and State Savings Employee After-Tax Contribution Account Withdrawals. A Participant shall have the right to withdraw, at any time, all or a portion of his State Savings Rollover Contribution Account or his State Savings Employee After-Tax Contribution Account

(2) Withdrawals After Age 59-1/2. A Participant who has not terminated employment shall have the right to make withdrawals from his State Savings Account (including each of its subaccounts) if he has reached age 59-1/2.

(g) Loans. Except to the extent permitted by Section 7.6 of the Plan, a Participant shall not be permitted to borrow from his State Savings Account. Any outstanding loans as of the Merger Date shall

continue to be administered in accordance with the terms of the State Savings Plan prior to the Merger Date.

(h) Forms of Payment. Subject to Sections 8.5(c) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1 (a) and (b) of the Plan, a Participant entitled to a distribution or a withdrawal (including a withdrawal under (f) above, but excluding a hardship withdrawal under (e) above) prior to December 31, 2002 may elect to have his State Savings Account paid in one or more of the forms described below. These forms are not available for distributions or withdrawals commencing on or after December 31, 2002.

(1) an annuity for the life the Participant,

(2) an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Beneficiary which is equal to 50%, 75% or 100% of the amount of the annuity which is payable during the joint lives of the Participant and his Beneficiary,

(3) any other annuity form of payment provided by an insurance company through the purchase of an annuity contract.

(4) Qualified Joint and Survivor Annuity.

(A) Automatic Form of Payment. The form of payment of a Participant's State Savings Account shall be a Qualified Joint and Survivor Annuity (defined in (B) below) if:

(i) the Participant elects payment of benefits in the form of a life annuity; and

(ii) the Participant has not waived such amounts pursuant to (C) below.

(B) Definition of Qualified Joint and Survivor Annuity.

(i) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse. The Participant may elect to receive a smaller annuity benefit with continuation of payments to the spouse at a rate of seventy-five percent (75%) or one hundred percent (100%) of the rate payable to the Participant during his lifetime.

(ii) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(iii) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable State Savings Account balance.

(C) Waiver.

(i) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(ii) Revocation. A Participant may also revoke any waiver under (i) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(iii) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(a) the terms and conditions of the Qualified Joint and Survivor Annuity,

(b) the Participant's right to make, and the effect of, an election under (i) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(c) the rights of the Participant's spouse under (D) below,

(d) the right to make, and the effect of, a revocation of an election under (ii) above, and

(e) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(D) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(i) such spouse consents in writing to such election, and such spouse's consent:

(a) acknowledges the effect of such election,

(b) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(c) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent

of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(d) is witnessed by a Plan representative or a notary public; or

(ii) it is established to the satisfaction of a Plan representative that the consent required under (i) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (i)(b) and (c) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(i) Preretirement Survivor Annuity.

(1) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(A) the Participant dies before the commencement of benefit payments;

(B) prior to his death, the Participant elects payments of his State Savings Account in the form of a life annuity;

(C) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or,

if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(D) payment of the Preretirement Survivor Annuity commenced before December 31, 2002.

(2) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of 100 percent of the Participant's nonforfeitable State Savings Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse.

(3) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(A) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity does not exceed $5,000 and such payment is made before payment otherwise begins; or

(B) the Surviving Spouse elects in writing to receive the lump sum distribution, such election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public.

Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(4) Reduction of Other Death Benefits. In determining the amount of death payments otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity shall be subtracted from the amount otherwise determined.

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APPENDIX XIV

CITIZENS FEDERAL BANK, F.S.B.

1. Past Service Credit.

(a) CitFed Employees. For purposes of this Appendix, "CitFed Employee" means an individual who, immediately prior to June 26, 1998, was employed by CitFed Bancorp, Inc. or any of its subsidiaries and who became an Employee as of June 26, 1998. "CitFed Employee" also means an individual who would have met the foregoing criteria except for the fact that he became an Employee prior to June 26, 1998 but in connection with the acquisition of CitFed Bancorp, Inc. and subsidiaries by Fifth Third Bancorp.

(b) Past Service Credit and Eligibility. CitFed Employees shall be credited with Service under Section 2.43 of the Plan for their service with CitFed Bancorp, Inc. and its subsidiaries. Service with CitFed Bancorp, Inc. and its subsidiaries shall be determined under rules comparable to those under Section 2.43 of the Plan. In no event shall there be any duplication of service for the same period.

2. Cash Balance Participants Eligible for Profit Sharing Effective December 31, 2000 – December 30, 2001 Plan Year. Notwithstanding Section 4.2(c) of the Plan or any other provision of the Plan, a Cash Balance Participant (as defined below), shall not be considered an "Eligible Participant" under Section 4.2(c) of the Plan and shall not be entitled to receive an allocation

of any Employer contribution under Section 4.2 of the Plan for any Plan Year beginning before December 31, 2000. For Plan Years beginning December 31, 2000 and later, this exclusion shall no longer apply. For purposes of this Appendix, "Cash Balance Participant" shall mean a Participant who satisfies all of the following conditions:

(a) he is employed by The Fifth Third Bank of Western Ohio or another subsidiary of Fifth Third Bancorp on December 31, 1998; and

(b) he was employed by CitFed Bancorp, Inc. or any of its subsidiaries on the day before the CitFed Closing Date; and

(c) except in the case of the Participant who is the Chairman of Fifth Third Bank of Western Ohio as of December 31, 1998, he has not entered a written employment contract in connection with the acquisition by Fifth Third Bancorp.

3. Merger of the Citizens Federal Bank, F.S.B. and Related Companies Amended and Restated Savings and Investment 401(k) Plan into the Plan.

(a) Merger Date. Effective as of October 1, 1999 (the "Merger Date"), the Citizens Federal Bank, F.S.B. and Related Companies Amended and Restated Savings and Investment 401(k) Plan (the "Citizens Federal Plan") merged into the Plan. The Citizens Federal Plan is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 1 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. Upon the merger, those

individuals who were not already Participants (or Beneficiaries) but who have Citizens Federal Accounts became Participants (or Beneficiaries).

(b) Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Citizens Federal Plan shall be separately accounted for under the Plan. A Participant shall have a Citizens Federal Account which, as of the Merger Date, shall be equal to his accounts under the Citizens Federal Plan as of such date. A Participant's Citizens Federal Account shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be established for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his Citizens Federal Account as are necessary in order to separately account for the merger of the Citizens Federal Plan into the Plan:

(1) a "Citizens Federal Participant's Elective Account," which is attributable to a "Participant's Elective Account" under the Citizens Federal Plan, as adjusted in accordance with Article 7.

(2) a "Citizens Federal Participant's Account," which is attributable to a "Participant's Account" and "Restricted Stock Account" under the Citizens Federal Plan as adjusted in accordance with Article 7.

(3) a "Citizens Federal Participant's Rollover Account" which is attributable to a "Participant's Rollover Account" (if any) under the

Citizens Federal Plan, as adjusted in accordance with Article 7.

The foregoing subaccounts shall be considered to be a part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's Citizens Federal Participant's Elective Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

(c) Investment of Citizens Federal Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire Citizens Federal Account (including each of its subaccounts).

(d) Vesting. A Participant's rights to his Citizens Federal Account shall be nonforfeitable at all times.

(e) Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), the Participant may withdraw first from his Citizens Federal Participant's Account and his Citizens Federal Participant's Rollover Account and then from his Citizens Federal Participant's Elective Account (excluding earnings). Hardship withdrawals shall be governed by Section 8.1 of the Plan. Any hardship withdrawals shall be paid in a lump sum consistent with Section 9.1(a) of the Plan.

(f) Loans. Except to the extent permitted by Section 7.6 of the Plan, a Participant shall not be permitted to borrow from his Citizens Federal Account. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the

terms of the Citizens Federal Plan prior to the Merger Date.

(g) Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent a Participant's Citizens Federal Account is invested in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock represented by his interest in the Fifth Third Stock Fund distributed to him in any distribution of his Citizens Federal Account to which he is entitled under the Plan (other than a hardship withdrawal under (e) above or other in-service withdrawal permitted under the Plan).

(h) Forms of Payment. Subject to Sections 8.5(c) and 9.1(c) of the Plan, in addition to the other forms of benefit available under Section 9.1(b) of the Plan, a Participant entitled to a distribution (excluding a hardship withdrawal under (e) above or other in-service withdrawal permitted under the Plan) prior to December 31, 2002 may elect to have his Citizens Federal Account paid in one or more of the forms described below. These forms are not available for distributions commencing on or after December 31, 2002.

(1) Annuity. Any form of annuity provided by an insurance company through the purchase of an annuity contract.

(2) Qualified Joint and Survivor Annuity.

(A) Automatic Form of Payment. The form of payment of a Participant's Citizens Federal Account shall be a Qualified Joint and Survivor Annuity (defined in (B) below) if:

(i) the Participant elects payment of benefits in the form of a life annuity, and

(ii) the Participant has not waived such annuity pursuant to (C) below.

(B) Definition of Qualified Joint and Survivor Annuity.

(i) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse. The Participant may elect to receive a smaller annuity benefit with continuation of payments to the spouse at a rate of seventy-five percent (75%) or one hundred percent (100%) of the rate payable to the Participant during his lifetime.

(ii) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(iii) Amount. The Qualified Joint and Survivor Annuity will be the amount of

benefit which can be purchased with the Participant's nonforfeitable Citizens Federal Account balance.

(C) Waiver.

(i) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(ii) Revocation. A Participant may also revoke any waiver under (i) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(iii) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(a) the terms and conditions of the Qualified Joint and Survivor Annuity,

(b) the Participant's right to make, and the effect of, an election under (i) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(c) the rights of the Participant's spouse under (D) below,

(d) the right to make, and the effect of, a revocation of an election under (ii) above, and

(e) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(D) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(i) such spouse consents in writing to such election, and such spouse's consent:

(a) acknowledges the effect of such election,

(b) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(c) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the

Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(d) is witnessed by a Plan representative or a notary public; or

(ii) it is established to the satisfaction of a Plan representative that the consent required under (i) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (i)(b) and (c) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary of Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(i) Preretirement Survivor Annuity.

(1) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(A) the Participant dies before the commencement of benefit payments;

(B) prior to his death, the Participant elects payments of his Citizens Federal Account in the form of a life annuity;

(C) the Participant and such Surviving Spouse were married throughout the 1-year

period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year; and

(D) payment of the Preretirement Survivor Annuity commenced before December 31, 2002.

(2) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse, which is the actuarial equivalent of one hundred percent (100%) of the Participant's nonforfeitable Citizens Federal Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70-1/2) elected by such Surviving Spouse

(3) Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount otherwise payable under the Plan as a Preretirement Survivor Annuity to a Surviving Spouse shall be paid in a lump sum provided that:

(A) the value (determined as of the date of distribution) of such Preretirement Survivor Annuity does not exceed $5,000 and such payment is made before payment otherwise begins; or

(B) the Surviving Spouse elects in writing to receive the lump sum distribution, such

election acknowledges its effect, and the election is witnessed by a Plan representative or a notary public.

Such lump sum shall be paid as soon as administratively feasible after the Participant's death.

(4) Reduction of Other Death Benefits. In determining the amount of death payments otherwise payable under Section 10.1 of the Plan, the amount applied in providing a Preretirement Survivor Annuity shall be subtracted from the amount otherwise determined.

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APPENDIX XV

ENTERPRISE FEDERAL SAVINGS BANK
AND
ENTERPRISE FEDERAL BANCORP, INC.
EMPLOYEE STOCK OWNERSHIP PLAN

1. Past Service Credit.

(a) Enterprise Federal Employees. For purposes of this Appendix, "Enterprise Federal Employee" means an individual who, immediately prior to May 14, 1999, was employed by Enterprise Federal Savings Bank or Enterprise Federal Bancorp, Inc. and who became an Employee as of May 14, 1999. "Enterprise Federal Employee" also means an individual who would have met the foregoing criteria except for the fact that he became an Employee prior to May 14, 1999 but in connection with the merger of Enterprise Federal Savings Bank and Enterprise Federal Bancorp into Fifth Third Bank and Fifth Third Bancorp.

(b) Past Service Credit and Eligibility. Enterprise Federal Employees shall be credited with Service under Section 2.43 of the Plan for their service with Enterprise Federal Savings Bank, Enterprise Federal Bancorp, Inc. and any predecessor employer for which Enterprise Federal Savings Bank has credited service. Such Service shall be determined under rules comparable to those under Section 2.43 of the Plan. The transition rules in Section 2.43(a)(4) of the Plan shall have no effect with respect to Enterprise Federal

Employees. In no event shall there be any duplication of service for the same period.

2. No Profit Sharing Contributions. Notwithstanding anything in the plan to the contrary, Enterprise Federal Employees shall not be considered "Eligible Participants" under Section 4.2 of the Plan and therefore they shall not be entitled to receive an allocation of the Employer contribution under Section 4.2 of the Plan.

3. Merger of Enterprise Federal ESOP into the Plan. Effective as of July 31, 1999 (the "Plan Merger Date"), the Enterprise Federal Bancorp, Inc. Employee Stock Ownership Plan (the "Enterprise ESOP") merged into the Plan. The Enterprise ESOP is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 1 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. Upon the merger, those individuals who were not already Participants (or Beneficiaries) but who have Enterprise ESOP Accounts (as described in paragraph 4 below) became Participants (or Beneficiaries).

4. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Enterprise ESOP shall be separately accounted for under the Plan. A Participant shall have an Enterprise ESOP Account which, as of the Merger Date, shall be equal to his "Company Stock Account" under the Enterprise ESOP as of such date. A Participant's Enterprise ESOP Account shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated

under the Plan. The Enterprise ESOP Account shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan.

5. Investment of Enterprise ESOP Account.

(a) Fifth Third Stock. Subject to Section 7.3(b) of the Plan and (b) below, a Participant's Enterprise ESOP Account shall be invested solely in shares of common stock of Fifth Third Bancorp. The Administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp common stock as part of the Fifth Third Stock Fund under Section 7.4 or under any other recordkeeping methodology it deems appropriate.

(b) Diversification Election. A Participant (whether or not he has met the eligibility requirements for a diversification election under Section 7.4(b) of the Plan) shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Enterprise ESOP Account; provided, however, the Fifth Third Stock Fund shall be one of the available investment funds.

6. Vesting. A Participant's rights to his Enterprise ESOP Account shall be nonforfeitable at all times.

7. Voting of Fifth Third Stock. To the extent a Participant's Enterprise ESOP Account and/or Employer Matching Account are invested in shares of common stock of Fifth Third Bancorp, including if such investment is represented by an interest in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the Trustee in writing as to the manner in which the shares are to be voted at each annual or

special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant or Beneficiary shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

8. Distribution in Fifth Third Stock. To the extent a Participant's Enterprise ESOP Account and/or Employer Matching Account are invested in shares of common stock of Fifth Third Bancorp, including if such investment is represented by an interest in the Fifth Third Stock Fund, a Participant may elect to have whole shares of Fifth Third Bancorp common stock distributed to him, in any distribution to which he is entitled under the Plan, in accordance with Section 9.1 of the Plan.

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APPENDIX XVI

CNB BANCSHARES, INC.
AND
SUBSIDIARIES

1. Past Service Credit.

(a) CNB Employee. For purposes of this Appendix, "CNB Employee" means an individual who, immediately prior to the merger of CNB Bancshares, Inc. into Fifth Third Bancorp, was employed by CNB Bancshares, Inc., or any subsidiary of CNB Bancshares, Inc.

(b) Past Service Credit and Eligibility. Each CNB Employee who was an Employee of an Employer on January 1, 2000 (and who was an employee of any subsidiary of Fifth Third Bancorp on the first business day after the merger of CNB Bancshares, Inc. into Fifth Third Bancorp), shall be credited with Service under Section 2.43 of the Plan for his service with CNB Bancshares, Inc., Civitas Bank (now know as Fifth Third Bank, Indiana), Wedgewood Partners, Inc., Civitas Insurance and any other subsidiary of CNB Bancshares, Inc. Such Service shall be determined under rules comparable to those under Section 2.43 of the Plan. In no event shall there be any duplication of service for the same period.

2. Merger of the Citizens Incentive Savings Plan into the Plan.

(a) Predecessor Plan. Effective as of August 24, 2001 (the "Merger Date"), the CISP merged into the Plan. The CISP is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 1 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. Upon the merger, an individual who was not already a Participant (or Beneficiary) but who had an account in the CISP at the time of the Merger, became a Participant (or Beneficiary).

(b) Accounting. The portion of a Participant's Account attributable to his accrued benefit under the CISP as of the Merger Date shall be equal to his accounts under the CISP as of such date and shall be accounted for under the Plan as described below. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) a CISP Matching Contribution Account, a CISP Discretionary Contribution Account and a CISP Merger Account to the extent necessary to account for the merger of the CISP into the Plan. The foregoing subaccounts shall be considered to be a part of the Participant's Account within the meaning of Section 2.1 of the Plan. Such subaccounts shall be adjusted in accordance with Article 7 and shall not share in any contributions or forfeitures allocated under the Plan.

Amounts attributable to the various subaccounts in the CISP shall be reflected in the following subaccounts in this Plan:

(1) amounts attributable to an "Employee Deferral Account" under the CISP shall be

reflected in the Section 401(k) Salary Deferral Account in this Plan.

(2) amounts attributable to an "Employer Matching Contribution Account" under the CISP shall be reflected in the CISP Matching Contribution Account in this Plan.

(3) amounts attributable to an "Employer Discretionary Contribution Account" under the CISP, shall be reflected in the CISP Discretionary Contribution Account in this Plan.

(4) amounts attributable to an "Employee Rollover Contribution Account" under the CISP, shall be reflected in the Rollover Account in this Plan.

(5) amounts attributable to a "Merger Account" under the CISP shall be reflected in the CISP Merger Account in this Plan.

(c) Investment of CISP Accounts. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his CISP Matching Contribution Account, CISP Discretionary Contribution Account and CISP Merger Account.

(d) Vesting. A Participant's rights to his CISP Matching Contribution Account, CISP Discretionary Contribution Account and CISP Merger Account shall be nonforfeitable at all times.

(e) Withdrawals After Age 59½. A Participant described below who has not terminated employment shall have the right to make withdrawals (as indicated

below) from his Section 401(k) Salary Deferral Account if he has reached age 59½.

(1) First Corporation Participant. A Participant who was a participant in the "First Corporation Savings Plan" (as defined in the CISP) on or prior to December 31, 1993 shall have the right to make age 59½ withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the First Corporation Savings Plan prior to January 1, 1994. No more than two withdrawals may be made pursuant to this paragraph (e)(1) during a Plan Year.

(2) Bank of Orleans Participant. A Participant who was a participant in the "Bank of Orleans Retirement Savings Plan" (as defined in the CISP) on or prior to December 31, 1995 shall have the right to make age 59½ withdrawals from the portion of his Section 401(k) Salary Deferral Account attributable to his elective deferrals under the Bank of Orleans Retirement Savings Plan prior to December 31, 1995. No more than one withdrawal may be made pursuant to this paragraph (e)(2) during a Plan Year.

(f) Loans. Except to the extent permitted by Section 7.6 of the Plan, a Participant shall not be permitted to borrow from the portion of his Account attributable to the CISP. Any outstanding loans as of the Plan Merger Date shall continue to be administered in accordance with the terms of the CISP prior to the Plan Merger Date.

(g) Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's

Account attributable to the CISP is invested in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock represented by his interest in the Fifth Third Stock Fund distributed to him in any distribution of the portion of his Account attributable to the CISP to which he is entitled under the Plan (other than a withdrawal under (e) above or other in-service withdrawal permitted under the Plan).

(h) Increased Cash-Out Limit. Notwithstanding the merger of the CISP into the Plan, the CISP is hereby deemed amended retroactively to January 1, 1998 to reflect the increased cash-out limit as follows: "$5,000" replaces "$3,500" each time it appears in Sections 5.5 and 8.1 of the CISP. If a CISP participant's benefit became distributable before January 1, 1998 but had not been paid by December 31, 1997, and if the value (determined as of the date of distribution) of his benefit under the CISP does not exceed $5,000, then such benefit shall be paid in a lump sum as soon as administratively practicable after December 31, 1997.

(i) Required Beginning Date. Notwithstanding the merger of the CISP into the Plan, the CISP is hereby deemed amended retroactively to January 1, 1998 to reflect the following operational change in the "Required Beginning Date" provisions of Section 5.4 of the CISP: An individual (other than a 5-percent owner) who attained age 70½ in 1997 or later, was permitted to elect to defer commencement of his

benefit until April 1 of the calendar year following the calendar year in which he retires.

(j) ADP/ACP Testing Methods. Notwithstanding the merger of the CISP into the Plan, for all plan years beginning after December 31, 1996, the CISP used the "current year testing method" to determine compliance with the nondiscrimination tests of Sections 401(k) and 401(m) of the Code.

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APPENDIX XVII

OTTAWA FINANCIAL CORPORATION AND SUBSIDIARIES

1. Company Merger. Effective as of the "Effective Time" as defined in the Affiliation Agreement between Ottawa Financial Corporation and Fifth Third Bancorp (the "Company Merger Date"), Ottawa Financial Corporation merged into Fifth Third Bancorp and its subsidiary, AmeriBank, merged into Fifth Third Bank, Indiana.

2. Ottawa Employee. For purposes of this Appendix, "Ottawa Employee" means an individual who, immediately prior to the Company Merger Date, was employed by Ottawa Financial Corporation or any subsidiary of Ottawa Financial Corporation.

3. Exclusion Before January 1, 2001. Anything in the Plan to the contrary notwithstanding, in no event shall an Ottawa Employee become a Participant prior to January 1, 2001. As such, in no event, shall an Ottawa Employee, prior to January 1, 2001, be eligible to make contributions of any type under the Plan or to receive allocations of contributions of any type under the Plan. Effective January 1, 2001, Ottawa Employees shall no longer be excluded by category from Plan participation. As such, an Ottawa Employee who is an Employee of an Employer on January 1, 2001 shall become a Participant under Section 3.1(a) and shall be eligible immediately to make 401(k) contributions (under Section 4.1), after-tax contributions (under

Section 4.5) and rollover contributions (under Section 4.6).

4. Past Service Credit and Eligibility. Effective as of the Company Merger Date, Ottawa Employees shall be credited with Service under Section 2.43 of the Plan for their service with Ottawa Financial Corporation, its subsidiaries and any predecessor employer for which Ottawa Financial Corporation or its subsidiaries have credited service. Such Service shall be determined under rules comparable to those under Section 2.43 of the Plan.

5. Merger of Ottawa Financial Corporation ESOP into the Plan. Effective as of March 26, 2001 (the "Plan Merger Date"), the Ottawa Financial Corporation Employee Stock Ownership Plan (the "Ottawa ESOP") merged into the Plan. The Ottawa ESOP is a Predecessor Plan; provided, however, there shall be no duplication of Service for the same period of time, by reason of the crediting of Service under paragraph 4 above and the crediting of service under Section 2.43(a)(4) by reason of the designation of the Predecessor Plan. The provisions set forth below shall be effective from and after the Merger Date. Upon the plan merger, those individuals who were not already Participants (or Beneficiaries) but who have "Ottawa ESOP Participant Accounts" (as defined in paragraph 10 below) became Participants (or Beneficiaries).

6. Assumption of ESOP Loan and Suspense Account. Effective as of the Plan Merger Date, the Plan assumed all of the Ottawa ESOP's rights and obligations under that plan's "Exempt Loan" (as defined in the Ottawa ESOP), and the "Exempt Loan Suspense Account" (as described in the Ottawa ESOP).

Such Exempt Loan and Exempt Loan Suspense Account became part of that portion of the Plan which constitutes a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code (that part of the Plan which constitutes a stock bonus plan and an employee stock ownership plan shall hereinafter be referred to as the Plan's "ESOP Feature") and shall be held and administered in accordance with the terms of the Plan and this Appendix.

7. Application of Dividends on Employer Securities.

(a) On Allocated Shares. Dividends paid on shares of common stock of Fifth Third Bancorp which are allocated to Participants' Accounts shall not be used to repay the "Ottawa Exempt Loan" (as defined in paragraph 8 below). Instead, such dividends shall be allocated to such Participants' Accounts in accordance with the Plan's recordkeeping methodologies and shall be used to purchase additional shares of common stock of Fifth Third Bancorp.

(b) On Unallocated Shares. Dividends paid on shares of common stock of Fifth Third Bancorp which are held in the "Ottawa ESOP Suspense Account" (as defined in paragraph 12 below) shall be used to repay the Ottawa Exempt Loan. As provided in paragraph 9 below, shares released on such repayment shall be allocated as matching contributions under the Plan's ESOP Feature under Section 4.4 of the Plan.

8. Ottawa Exempt Loan. The Exempt Loan assumed from the Ottawa ESOP (the "Ottawa Exempt Loan") shall be subject to the following terms and conditions and shall be interpreted so as to constitute

an "exempt loan" under Treasury Regulations section 54.4975-7(b)(1)(iii):

(a) the proceeds of the loan were used by the Ottawa ESOP within a reasonable time after their receipt to acquire qualifying employer securities;

(b) the only Plan Assets that may be given as collateral for the loan are the qualifying employer securities which:

(i) were acquired with the proceeds of the loan; or

(ii) were used as collateral on a prior loan which was repaid with the proceeds of the current loan;

(c) under the terms of the loan, the creditor shall have no recourse against the Plan except with respect to:

(i) the collateral given for the loan;

(ii) contributions that are made to the Plan to meet its obligations under the loan; and

(iii) earnings attributable to such collateral and the investment of such contributions;

(d) the payments made with respect to the loan during a Plan Year shall not exceed an amount equal to the sum of such contributions and earnings received during or prior to the Plan Year less such payments in prior Plan Years; such contributions and

earnings shall be accounted for separately in the books of account of the Plan until the loan is repaid;

(e) in the event of default upon the loan, the value of Plan Assets transferred in satisfaction of the loan shall not exceed the amount of default; if the creditor is a disqualified person, the loan shall provide for a transfer of Plan Assets upon default only upon and to the extent of the failure of the Plan to meet the payment schedule of the loan;

(f) the interest rate of the loan shall not be in excess of a reasonable rate of interest;

(g) with respect to the release from encumbrance of Plan Assets used as collateral for the loan, one of the following shall apply:

(i) if for each Plan Year during the duration of the loan, the number of qualifying employer securities released is to be determined by reference to principal payments on the loan, then the loan must provide for annual payment of principal and interest at a cumulative rate that is not less rapid at any time than level payments of such amounts for ten years, provided that interest included in any payment is disregarded only to the extent that it would be determined to be interest under standard loan amortization tables and provided further that the expired duration

of the loan, and any renewal, extension or refinancing thereof, does not exceed ten years, or

(ii) if the number of qualifying employer securities released each Plan Year will not be determined with reference to principal payments on the loan, then for each Plan Year during the duration of the loan, the number of qualifying employer securities released shall equal the number of encumbered qualifying employer securities held immediately before release for the current Plan Year multiplied by a fraction, the numerator of which is the amount of principal and interest paid for the year and denominator of which is the sum of the numerator plus the principal and interest to be paid for all future years; and

(h) the loan shall be for a specific term and shall not be payable at the demand of any person, except in the case of default.

9. Ottawa ESOP Suspense Account.

(a) General. Shares of common stock of Fifth Third Bancorp held in the Exempt Loan Suspense Account (as described in the Ottawa ESOP) upon the Ottawa ESOP's merger into this Plan shall continue to be held in a suspense account (not belonging to any

Participant) under this Plan known as the "Ottawa ESOP Suspense Account."

(b) Release and Allocation as Matching Contributions. As the Ottawa Exempt Loan is repaid and such shares are released from collateral pursuant to the terms of the Ottawa Exempt Loan, such shares shall be allocated from the Ottawa ESOP Suspense Account to Participants' Employer Matching Accounts as matching contributions under Section 4.4 of the Plan. This release and allocation of shares of common stock of Fifth Third Bancorp shall be in lieu of the contributions otherwise required under Section 4.4. The amount of the matching contributions shall be calculated as otherwise provided in Section 4.4. The value of the shares of common stock of Fifth Third Bancorp released and allocated hereunder shall be applied toward the amount of matching contributions otherwise determined under Section 4.4 at the time and in the manner the Administrator shall determine in its sole and absolute discretion. Upon allocation to the Participants' Employer Matching Accounts (unless a diversification election is in effect), the Administrator, in its discretion, may account for such shares of common stock of Fifth Third Bancorp as part of the Fifth Third Stock Fund under Section 7.4 or under any other recordkeeping methodology it deems appropriate.

(c) Termination of Ottawa ESOP Suspense Account. In order to terminate the Ottawa ESOP Suspense Account on account of the merger of Ottawa Financial Corporation into Fifth Third Bancorp, the merger of AmeriBank into Fifth Third Bank, Indiana and the merger of the Ottawa ESOP into the Plan, the

Administrator, in its discretion, may direct the Trustee to sell shares held in the Ottawa ESOP Suspense Account to repay the Ottawa Exempt Loan (including interest). Any such sale or sales shall be consistent with the amount of the matching contribution obligations under Section 4.4 of the Plan such that no more shares shall be sold in a particular sale than are necessary to cause a release from the Ottawa ESOP Suspense Account in the amount necessary to meet the amount of the matching contributions obligation under Section 4.4 of the Plan, determined in accordance with (b) above.

10. Ottawa ESOP Participant Account--Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under Ottawa ESOP shall be separately accounted for under the Plan. A Participant shall have an "Ottawa ESOP Participant Account" which, as of the Plan Merger Date, shall be equal to his "Employee Stock Ownership Account" (as described in the Ottawa ESOP) under the Ottawa ESOP as of such date. A Participant's Ottawa ESOP Participant Account shall be adjusted in accordance with Article 7 (and paragraph 14 below) and shall not share in any contributions or forfeitures allocated under the Plan. The Ottawa ESOP Participant Account shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan.

11. Investment of Ottawa ESOP Participant Account.

(a) Fifth Third Stock. Subject to Section 7.3(b) of the Plan and (b) below, an Ottawa ESOP Participant Account shall be invested solely in shares of common stock of Fifth Third Bancorp. The

Administrator, in its sole discretion, may account for such shares of Fifth Third Bancorp common stock as part of the Fifth Third Stock Fund under Section 7.4 or under any other recordkeeping methodology it deems appropriate.

(b) Diversification Election. A Participant (whether or not he has met the eligibility requirements for a diversification election under Section 1.3(b) of the Plan) shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Ottawa ESOP Participant Account; provided, however, the Fifth Third Stock Fund shall be one of the available investment options.

12. Vesting. A Participant shall be fully vested in his Ottawa ESOP Participant Account.

13. Voting of Fifth Third Stock.

(a) Allocated Shares. To the extent a Participant's Ottawa ESOP Participant Account and/or Employer Matching Account are invested in shares of common stock of Fifth Third Bancorp, including if such investment is represented by an interest in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the Trustee in writing as to the manner in which the shares are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant or Beneficiary shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(b) Unallocated Shares. Any shares of common stock of Fifth Third Bancorp held in the Ottawa ESOP Suspense Account shall be voted by the Trustee. The Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or other right relating to such stock, as it has with any other Plan Asset.

14. Distribution in Fifth Third Stock. To the extent a Participant's Ottawa ESOP Participant Account and/or Employer Matching Account are invested in shares of common stock of Fifth Third Bancorp, including if such investment is represented by an interest in the Fifth Third Stock Fund, a Participant may elect to have whole shares of Fifth Third Bancorp common stock distributed to him, in any distribution to which he is entitled under the Plan, in accordance with Section 9.1 of the Plan.

15. Actual Contribution Percentage Test. For purposes of the actual contribution percentage test under Section 4.4(c) of the Plan and section 401(m) of the Code, the amount of the matching contributions otherwise determined under Section 4.4 of the Plan shall be taken into account under Section 2.3(b) of the Plan at the amount so determined notwithstanding that such matches are not contributed but instead are allocated from the Ottawa ESOP Suspense Account under paragraph 9 of this Appendix.

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX XVIII

OLD KENT FINANCIAL CORPORATION AND SUBSIDIARIES

1. Eligibility.

(a) Definitions.

(1) Old Kent Employee. For purposes of this Appendix, "Old Kent Employee" means an individual who, immediately prior to the merger of Old Kent Financial Corporation into Fifth Third Bancorp, was employed by Old Kent Financial Corporation or any subsidiary of Old Kent Financial Corporation.

(2) Old Kent Subsidiary. For purposes of this Appendix, "Old Kent Subsidiary" means a corporation which, immediately prior to the merger of Old Kent Financial Corporation into Fifth Third Bancorp, was a subsidiary (direct or indirect) of Old Kent Financial Corporation, as well as the surviving corporation of any merger or consolidation of such an entity with one or more subsidiaries (direct or indirect) of Fifth Third Bancorp. A corporation shall be considered an "Old Kent Subsidiary" only while a subsidiary (direct or indirect) of Fifth Third Bancorp.

(b) Exclusion of Old Kent Employees Prior to December 31, 2001. Anything in the Plan to the contrary notwithstanding, in no event shall an Old Kent Employee be considered an "Employee" or a "Participant" under the Plan prior to December 31, 2001. As such, in no event, shall an Old Kent Employee

be eligible prior to December 31, 2001 to make contributions of any type under the Plan or to receive allocations of contributions of any type under the Plan. In the event an Old Kent Employee terminates employment and is later re-hired by an Old Kent Subsidiary or other Employer under the Plan, he shall no longer be considered an Old Kent Employee. If he is re-hired by an Employer other than an Old Kent Subsidiary, he shall be considered an Employee if he otherwise meets the Plan's definition in Section 2.19. If he is re-hired by an Old Kent Subsidiary, he shall be considered an Employee only if he otherwise meets the definition in Section 2.19 of the Plan and if his pay is not administered through the Lawson payroll system, as determined in the sole and absolute discretion of the Administrator.

(c) Eligibility of Certain Employees of Old Kent Subsidiaries Prior to December 31, 2001.

(1) Eligible Employees. For purposes of making certain individuals eligible "Employees" under the Plan, each Old Kent Subsidiary shall be considered an Employer. However, for purposes of eligibility under the Plan prior to December 31, 2001, only the following individuals shall be considered Employees of an Old Kent Subsidiary:

(A) an individual who is otherwise an "Employee" (i.e. he otherwise meets the definition in Section 2.19 of the Plan) of an Old Kent Subsidiary and whose Employment Commencement Date is on or after April 2, 2001 and whose pay is not administered through the Lawson payroll system, as determined in the sole and absolute discretion of the Administrator;

(B) an Employee of an Employer (other than an Old Kent Subsidiary) whose employment is transferred to an Old Kent Subsidiary (provided the individual continues to meet the definition of "Employee" in Section 2.19 of the Plan); and

(C) an individual who was previously employed by an Old Kent Subsidiary, who terminated employment with the Old Kent Subsidiary and who is re-hired by an Old Kent Subsidiary as an Employee (as otherwise defined in Section 2.19) on or after April 2, 2001 and whose pay is not administered through the Lawson payroll system, as determined in the sole and absolute discretion of the Administrator.

(2) Ineligible Employees Prior to December 31, 2001. Only the foregoing individuals shall be considered eligible "Employees" of an Old Kent Subsidiary prior to December 31, 2001. All other individuals employed by an Old Kent Subsidiary shall not be considered "Employees" under the Plan prior to December 31, 2001 even if they otherwise meet the definition of "Employee" under Section 2.19 of the Plan. Accordingly, the following individuals who are employed by an Old Kent Subsidiary shall not be considered "Employees" under the Plan prior to December 31, 2001:

(A) Old Kent Employees, except in the limited circumstance described in paragraph 1(b) above, where an Old Kent Employee terminates service and is re-hired on or after April 2, 2001 and is not on the Lawson payroll system; and

(B) individuals whose pay is administered through the Lawson payroll system, as determined in the sole and absolute discretion of the Administrator.

(d) Eligibility upon Merger of Old Kent Thrift Plan. Effective upon the merger of the Old Kent Thrift Plan into this Plan, each Old Kent Subsidiary shall be considered an Employer under the Plan, and each Old Kent Employee who otherwise meets the definition of "Employee" under the Plan at that time shall be considered an Employee and Participant under the Plan. As such, such an Employee shall become a Participant under Section 3.1(a) and shall be eligible immediately to make 401(k) contributions (under Section 4.1), after-tax contributions (under Section 4.5) and rollover contributions (under Section 4.6).

2. Merger of Old Kent Thrift Plan.

(a) Merger. Effective as of the close of business on December 31, 2001 (the "Merger Date"), the Old Kent Thrift Plan is completely amended and restated and merged into this Plan. This Plan represents a continuation of the Old Kent Thrift Plan and contributions shall continue as provided in this Plan. Upon the merger, an individual who is not already a Participant (or Beneficiary) but who had an account in the Old Kent Thrift Plan on the Merger Date, shall become a Participant (or Beneficiary).

(b) Predecessor Plan and Crediting of Past Service. The Old Kent Thrift Plan is a Predecessor Plan. Past service shall be credited as provided in (1) below for purposes of determining a Participant's nonforfeitable percentage under (e) below of his Old

Kent Matching Account. Past service shall be credited as provided in (2) below for purposes of determining a Participant's eligibility for, and Levels of Profit Sharing Allocation under Section 4.2 and eligibility for, and rate of matching contribution under Section 4.4

(1) Crediting of Past Service for Vesting Purposes. For purposes of determining a Participant's nonforfeitable percentage under (e) below of his Old Kent Matching Account, Service shall be determined under Section 2.43(a)(4) with respect to such Predecessor Plan, which shall be interpreted and operated as follows. Service under such Predecessor Plan shall be treated as Service under this Plan based on such Predecessor Plan's hour counting methodology through that Predecessor Plan's computation period ending December 31, 2001. Thereafter, Service shall be credited under this Plan's elapsed time method treating January 1, 2002 as the Participant's "Employment Commencement Date" (for individuals who are Employees on January 1, 2002). In all events, there shall be no duplication of Service for the same period.

(2) Crediting of Past Service for Profit Sharing and Matching Contributions. For purposes of determining a Participant's "Eligibility Years" for eligibility for Profit Sharing Allocations under Section 4.2 and matching contributions under Section 4.4 and of determining a Participant's "Vesting Years" for determining the Level in which a Participant falls under Section 4.2(d) and applicable rate of match under Section 4.4, Section 2.43(a)(4) shall be disregarded. Instead, a Participant's past service with Old Kent Financial Corporation or any subsidiary of Old Kent

Financial Corporation, as well as service with any such entity after it became an Affiliate, shall be taken into account under the elapsed time method under rules comparable to the rules in Section 2.43(a)(1), (2) and (3) of the Plan. In all events there shall be no duplication of service for the same period.

The Administrator shall have the sole power and authority to determine Service under the foregoing.

(c) Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the Old Kent Thrift Plan shall be separately accounted for under the Plan. A Participant shall have an Old Kent Account which, as of the Merger Date, shall be equal to his accounts under the Old Kent Thrift Plan as of such date. A Participant's Old Kent Account shall be adjusted in accordance with Section 7.2 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his Old Kent Account as are necessary in order to separately account for the merger of the Old Kent Thrift Plan into the Plan:

(1) an "Old Kent Thrift Plus Account," which is attributable to a Participant's "Thrift Plus Account" under the Old Kent Thrift Plan, as adjusted in accordance with Section 7.2.

(2) an "Old Kent Regular Account," which is attributable to a Participant's "Regular Account" under the Old Kent Thrift Plan, as adjusted in accordance with Section 7.2.

(3) an "Old Kent Matching Account," which is attributable to a Participant's "Matching Account" under the Old Kent Thrift Plan, as adjusted in accordance with Section 7.2.

(4) an "Old Kent Rollover/Transfer Account," which is attributable to a Participant's "Rollover/Transfer Account" under the Old Kent Thrift Plan, as adjusted in accordance with Section 7.2.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's Old Kent Thrift Plus Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

(d) Investment of Old Kent Account.

(1) General. A Participant shall have Participant-directed investment rights over his entire Old Kent Account (including each of its subaccounts) comparable to the Participant-directed investment rights described in Section 7.1(c)(2). Such Participant-directed investment rights applicable to a Participant's Old Kent Account shall be administered separately from such comparable investment rights as are applicable to other subaccounts under the Plan. The Administrator shall direct the Trustee as to the investment options to be made available for the Old Kent Accounts, which, initially shall be the same investment funds as are available under the Old Kent Thrift Plan as of the Merger Date. Such investment funds need not be the same as the investment funds made available for the investment of other subaccounts under the Plan. In all events, the Fifth Third Stock

Investment Option, as described in (2) below, shall be one of the available investment options.

(2) Fifth Third Stock Investment Option. The Fifth Third Stock Investment Option shall consist of common stock of Fifth Third Bancorp or a fund invested primarily in such shares.

(3) Voting of Employer Securities. To the extent a Participant's Old Kent Account is invested under the Fifth Third Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the trustee of The Fifth Third/Old Kent Profit Sharing Trust (or the Trustee) in writing as to the manner in which his shares (or the shares represented by his interest in any such fund) are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset. For voting purposes, the Fifth Third Stock Investment Option shall be considered the "Fifth Third Stock Fund" referred to in The Fifth Third/Old Kent Profit Sharing Trust Agreement.

(4) ESOP Designation. Effective December 31, 2001, the Fifth Third Stock Investment Option shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code. This ESOP designation shall apply as well to the Old Kent Thrift Plan as it existed

on December 31, 2001 prior to the merger into this Plan.

(e) Vesting. A Participant's rights to his Old Kent Thrift Plus Account, Old Kent Regular Account and Old Kent Rollover/Transfer Account shall be nonforfeitable at all times. A Participant shall have a nonforfeitable right to a percentage of his Old Kent Matching Account on the basis of the number of his Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 5	0%
5 or more	100%

Upon and after a Participant's attainment of age 55, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his Old Kent Matching Account. In addition, the provisions of Section 6.1(f)(2)(B) and (C), (3), (5) and (7) shall apply to a Participant's Old Kent Matching Account.

Notwithstanding the foregoing, a Participant's rights to any net earnings credited to his Old Kent Matching Account shall be nonforfeitable at all times.

(f) No Hardship Withdrawals. In no event shall the hardship withdrawal provisions of Section 8.1 of the Plan apply to any part of a Participant's Old Kent Account.

(g) In-Service Withdrawals.

(1) Old Kent Matching and Regular Account Total Withdrawal. A Participant who has not terminated employment shall have the right to

withdraw the total (and not less than the total) value of the nonforfeitable portion of his Old Kent Matching Account and Old Kent Regular Account. No amount held in the Participant's Old Kent Matching Account less than two years shall be distributed unless the Participant has been a Participant for at least 60 months. A Participant who elects a total withdrawal hereunder shall forfeit the forfeitable portion of his Old Kent Matching Account. If there is a forfeiture, the Participant shall be entitled to a restoration of the forfeited amount upon repayment of the entire amount withdrawn in accordance with Section 6.1(f)(5)(B).

(2) Old Kent Regular Account Withdrawal. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his Old Kent Regular Account. The amount of such withdrawal may not exceed the lesser of (a) the nonforfeitable portion of such Old Kent Regular Account, or (b) $100.

(3) Withdrawals from Old Kent Thrift Plus Account After Age 59½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his Old Kent Thrift Plus Account if he has reached age 59½. The amount of such withdrawal may not be less than the lesser of (a) the nonforfeitable portion of such Old Kent Thrift Plus Account, or (b) $100.

(4) Old Kent Rollover/Transfer Account Withdrawal. A Participant who has not terminated employment shall have the right to withdraw the total (and not less than the total) value of his Old Kent Rollover/Transfer Account.

(5) Procedural Matters. The withdrawal rights under (1), (2) and (3) above (but not (4) above) shall be subject to the following. A withdrawal under (3) above of the Participant's Old Kent Thrift Plus Account may be made at the same time as a withdrawal under (1) or (2) above but otherwise only one of the withdrawals described in (1), (2) and (3) above may be requested at any time. Only one withdrawal under (1), (2) and/or (3) above may be requested in a calendar year.

(h) Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the Old Kent Thrift Plan prior to the Merger Date. A Participant may borrow first from his Old Kent Thrift Plus Account and then from his Old Kent Rollover/Transfer Account. Loans shall be subject to Section 7.6 except as follows:

(1) Loans hereunder may be made for any reason and not limited to the circumstances in Section 7.6(b)(2) and the Participant need not comply with the withdrawal requirement of Section 7.6(b)(3).

(2) Except for the maximum loan limit under Section 7.6(c), the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from his Old Kent Account and his loan privileges from the remainder of his Account. As such, the minimum loan from a Participant's Old Kent Account hereunder is $1,000 and the minimum loan from other available accounts under Section 7.6 is $1,000.

(3) A Participant may have up to two loans outstanding from his Old Kent Account and up to

one loan outstanding from other available subaccounts under Section 7.6.

(4) A loan from the Old Kent Account used to purchase the Participant's primary residence may be for a term of up to ten years.

(5) The Administrator is authorized to administer the loan program as applied to the Old Kent Accounts and such administration may vary from the administration otherwise applicable to loans under Section 7.6.

(i) Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's Old Kent Account is invested in the common stock of Fifth Third Bancorp (or a fund consisting primarily of the common stock of Fifth Third Bancorp), the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his Old Kent Account (including an in-service withdrawal).

(j) Forms of Payment/Administration of Distributions. Notwithstanding Section 9.1(b) of the Plan, a distribution of an Old Kent Account to which a Participant is entitled shall be made in a single sum (which may include a distribution of common stock of Fifth Third Bancorp as provided in (i) above). The Administrator shall administer distributions of the Old Kent Account separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his

Old Kent Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $5,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4 and 9.9 (regarding the required beginning date and minimum distributions).

(k) Administration of Death Benefits. The provisions in this Plan concerning the payment of a Participant's Account upon his death prior to the application of his Account for his benefit shall be controlling for the entire Account (including the Old Kent Account) in the case of a Participant who dies after December 31, 2001. This includes Article 10 and the definition of Beneficiary (Section 2.9). The provisions of the Old Kent Thrift Plan, as it existed immediately prior to its merger into this Plan, shall be controlling with respect to the payment of the Old Kent Account, upon the death of a Participant on or before December 31, 2001 and prior to the application of his accounts in that Plan for his benefit. The disposition of any other subaccounts in the Plan (other than the Old Kent Account and its subaccounts) shall be controlled by this Plan.

(l) Application of Forfeitures. Any forfeitures under the Old Kent Thrift Plan that have not been applied pursuant to the provisions of that plan as of the Merger Date, shall be applied as provided in Section 6.2 of this Plan.

(m) Increased Cash-Out Limit. Notwithstanding the merger of the Old Kent Thrift Plan into the Plan, the Old Kent Thrift Plan is hereby deemed amended retroactively to January 1, 1998 to reflect the increased cash-out limit as follows: "$5,000"

replaces "$3,500" in Section 7.7(b)(iii) of the Old Kent Thrift Plan. If an Old Kent Thrift Plan participant's benefit became distributable before January 1, 1998 but had not been paid by January 1, 1998, and if the value (determined as of the date of distribution) of his benefit under the Old Kent Thrift Plan does not exceed $5,000, then such benefit shall be paid in a lump sum as soon as administratively practicable after January 1, 1998.

(n) Required Beginning Date. An Old Kent Thrift Plan participant (other than a 5-percent owner) who attained age 70½ before January 1, 1997, was permitted to elect in writing to stop receiving minimum distribution payments. If payments are suspended, payments shall recommence by the Participant's required beginning date under Section 8.5(d) of this Plan.

(o) ADP/ACP Testing. Notwithstanding the merger of the Old Kent Thrift Plan into the Plan, for all plan years beginning after December 31, 1996, the Old Kent Thrift Plan used the "prior year testing method" to determine compliance with the nondiscrimination tests of sections 401(k) and 401(m) of the Code. Such testing for the Old Kent Thrift Plan's plan year ending December 31, 2001 shall be performed separately from such testing for this Plan.

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XIX

USB, INC.

1. Definitions.

(a) USB Employee. For purposes of this Appendix, "USB Employee" means an individual who, immediately prior to the merger of USB, Inc. contemplated by the Agreement and Conditional Plan of Merger dated February 21, 2001 among Fifth Third Financial Corporation, FTFC, Inc. and USB, Inc., was employed by USB, Inc. as an employee and became an Employee in connection with such merger.

(b) Active USB Employee. For purposes of this Appendix, "Active USB Employee" means a USB Employee who, immediately prior to the merger was actively contributing under the section 401(k) feature of the USB, Inc. 401(k) Savings Plan (the "USB Plan").

2. Eligibility.

(a) 401(k) Eligibility of Active USB Employees. Effective November 1, 2001, an Active USB Employee who is an Employee shall be considered a Participant and shall be eligible to make section 401(k) contributions under Section 4.1 of the Plan. The Employer may treat an Active USB Employee as having made a compensation reduction election effective November 1, 2001 comparable to the 401(k) election such Participant had in effect under the USB Plan unless and until the Participant affirmatively elects to revoke or revise such election; provided such

Active USB Employee is provided an effective opportunity to receive cash. Until January 1, 2002, an Active USB Employee shall not be eligible to make or receive an allocation of any other type of contribution under the Plan.

(b) Eligibility of All USB Employees for All Purposes

(i) January 1, 2002 Eligibility. A USB Employee who is not an Active USB Employee shall not become a Participant prior to January 1, 2002. Therefore, such an individual shall not be eligible to make or receive an allocation of any type of contribution under the Plan prior to January 1, 2002. A USB Employee (including an Active USB Employee) who is an Employee of an Employer on January 1, 2002 shall be eligible immediately to make 401(k) contributions (under Section 4.1), after-tax contributions (under Section 4.5) and rollover contributions (under Section 4.6).

(ii) Past Service Credit. Effective January 1, 2002, each USB Employee who is an Employee of an Employer on January 1, 2002, shall be credited with Service under Section 2.43(a)(1), (2) and (3) of the Plan for his service with USB, Inc. Such Service shall be determined under rules comparable to those under Section 2.43(a)(1), (2) and (3) of the Plan.

RECORD
AND
BRIEFS

No. 12-751

Supreme Court, U.S.
FILED
JAN 27 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX, Volume 3

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Andrew L. Zivitz
Counsel of Record
Joseph H. Meltzer
Edward W. Ciolko
Shannon O. Braden
Kessler Topaz Meltzer & Check, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
azivitz@ktmc.com

Counsel for Respondents

Petition for Writ of Certiorari filed December 14, 2012
Petition for Writ of Certiorari granted December 13, 2013

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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FIRST AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Effective July 1, 2002, Section 7.6(b)(3) is deleted and the remaining subparagraphs of Section 7.6(b) are re-numbered from (4) through (12) to (3) through (11), respectively.

2. Effective July 1, 2002, Section 2(h)(1) of Appendix XVIII is amended by deleting "and the Participant need not comply with the withdrawal requirement of Section 7.6(b)(3)".

3. Section 2.1(g)(2) of Appendix XVIII is amended effective December 31, 2001 to change "exceed" to "be less than".

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 2 day of July, 2002.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

997120.1

SECOND AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), Appendix XVIII of the Plan is hereby amended effective as of November 15, 2002 by replacing Section 2(d) and all subsequent provisions of such Appendix XVIII with the following:

(d) Investment of Old Kent Account.

(1) General. A Participant shall have Participant-directed investment rights over his entire Old Kent Account (including each of its subaccounts) comparable to the Participant-directed investment rights described in Section 7.1(c)(2). Prior to the Recordkeeping Combination Date (defined below):

(A) such Participant-directed investment rights applicable to a Participant's Old Kent Account shall be administered separately from such comparable investment rights as are applicable to other subaccounts under the Plan.

(B) the Administrator shall direct the Trustee as to the investment options to be made available for the Old Kent Accounts, which, initially shall be the same

investment funds as are available under the Old Kent Thrift Plan as of the Merger Date.

(C) such investment funds need not be the same as the investment funds made available for the investment of other subaccounts under the Plan.

(D) in all events, the Fifth Third Stock Investment Option, as described in (2) below, shall be one of the available investment options.

On and after the Recordkeeping Combination Date, a Participant shall have the same Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his Old Kent Account.

(2) Fifth Third Stock Investment Option. The Fifth Third Stock Investment Option shall consist of common stock of Fifth Third Bancorp or a fund invested primarily in such shares. As of the Recordkeeping Combination Date, the Fifth Third Stock Investment Option shall become part of the Fifth Third Stock Fund (as defined in Section 7.4 of the Plan).

(3) Voting of Employer Securities. To the extent a Participant's Old Kent Account is invested under the Fifth Third Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the trustee of The Fifth Third/Old Kent Profit Sharing Trust (or the Trustee) in writing as to the manner in

which his shares (or the shares represented by his interest in any such fund) are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset. For voting purposes, the Fifth Third Stock Investment Option shall be considered the "Fifth Third Stock Fund" referred to in The Fifth Third/Old Kent Profit Sharing Trust Agreement. On and after the Recordkeeping Combination Date, the voting rights and procedures specified in Section 7.4(c) of the Plan shall be controlling.

(4) ESOP Designation. Effective December 31, 2001, the Fifth Third Stock Investment Option shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code. This ESOP designation shall apply as well to the Old Kent Thrift Plan as it existed on December 31, 2001 prior to the merger into this Plan.

(e) Vesting. A Participant's rights to his Old Kent Thrift Plus Account, Old Kent Regular Account and Old Kent Rollover/Transfer Account shall be nonforfeitable at all times. A Participant shall have a nonforfeitable right to a percentage of his Old Kent Matching Account on the basis of the number of his Vesting Years

with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 5	0%
5 or more	100%

Upon and after a Participant's attainment of age 55, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his Old Kent Matching Account. In addition, the provisions of Section 6.1(f)(2)(B) and (C), (3), (5) and (7) shall apply to a Participant's Old Kent Matching Account.

Notwithstanding the foregoing, a Participant's rights to any net earnings credited to his Old Kent Matching Account shall be nonforfeitable at all times.

(f) No Hardship Withdrawals. In no event shall the hardship withdrawal provisions of Section 8.1 of the Plan apply to any part of a Participant's Old Kent Account.

(g) In-Service Withdrawals.

(1) Old Kent Matching and Regular Account Total Withdrawal. A Participant who has not terminated employment shall have the right to withdraw the total (and not less than the total) value of the nonforfeitable portion of his Old Kent Matching Account and Old Kent Regular Account. No amount held in the Participant's Old Kent Matching Account less than two years shall be distributed unless the Participant has been a

Participant for at least 60 months or has credit for at least 5 Vesting Years. A Participant who elects a total withdrawal hereunder shall forfeit the forfeitable portion of his Old Kent Matching Account. If there is a forfeiture, the Participant shall be entitled to a restoration of the forfeited amount upon repayment of the entire amount withdrawn in accordance with Section 6.1(f)(5)(B). A request for withdrawal under this paragraph may be made only once per calendar quarter.

(2) Old Kent Regular Account Withdrawal. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his Old Kent Regular Account. Such withdrawals shall be governed by Section 8.2 of the Plan. A request for withdrawal under this paragraph may be made only once per calendar quarter.

(3) Withdrawals from Old Kent Thrift Plus Account After Age 59½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his Old Kent Thrift Plus Account if he has reached age 59½. A request for withdrawal under this paragraph may be made only once per calendar quarter.

(4) Old Kent Rollover/Transfer Account Withdrawal. A Participant who has not terminated employment shall have the right to withdraw the total (and not less than the total) value of his Old Kent Rollover/Transfer Account.

(5) Procedural Matters. The withdrawal rights under (1), (2) and (3) above (but not (4) above) shall be subject to the following. A withdrawal under (3) above of the Participant's Old Kent Thrift Plus Account may be made at the same time as a withdrawal under (1) or (2) above but otherwise only one of the withdrawals described in (1), (2) and (3) above may be requested at any time.

(h) Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the Old Kent Thrift Plan prior to the Merger Date. A Participant may borrow first from his Old Kent Thrift Plus Account and then from his Old Kent Rollover/Transfer Account. Loans shall be subject to Section 7.6 except as follows:

(1) Loans hereunder made prior to the Recordkeeping Combination Date may be made for any reason and not limited to the circumstances in Section 7.6(b)(2). Loans on and after the Recordkeeping Combination Date shall be subject to Section 7.6(b)(2).

(2) Except for the maximum loan limit under Section 7.6(c), for loans made prior to the Recordkeeping Combination Date the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from his Old Kent Account and his loan privileges from the remainder of his Account. As such, for loans made prior to the Recordkeeping Combination Date, the minimum loan from a Participant's Old Kent Account hereunder is

$1,000 and the minimum loan from other available accounts under Section 7.6 is $1,000. The limitations in Section 7.6 shall not apply separately for loans on and after the Recordkeeping Combination Date.

(3) A Participant may have up to two loans outstanding from his Old Kent Account and up to one loan outstanding from other available subaccounts under Section 7.6. Effective as of the Recordkeeping Combination Date, a new loan will not be made to a Participant with any other loans outstanding.

(4) A loan made prior to the Recordkeeping Combination Date from the Old Kent Account used to purchase the Participant's primary residence may be for a term of up to ten years.

(5) The Administrator is authorized to administer the loan program as applied to the Old Kent Accounts and such administration prior to the Recordkeeping Combination Date may vary from the administration otherwise applicable to loans under Section 7.6.

(i) Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's Old Kent Account is invested in the common stock of Fifth Third Bancorp (or a fund consisting primarily of the common stock of Fifth Third Bancorp including the Fifth Third Stock Fund), the Participant (or in the event of

his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his Old Kent Account (including an in-service withdrawal).

(j) Forms of Payment/Administration of Distributions. Notwithstanding section 9.1(b) of the Plan, a distribution of an Old Kent Account prior to the Recordkeeping Combination Date shall be made in a single sum (which may include a distribution of common stock of Fifth Third Bancorp as provided in (i) above). The Administrator shall administer distributions of the Old Kent Account prior to the Recordkeeping Combination Date separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his Old Kent Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $5,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4 and 9.9 (regarding the required beginning date and minimum distributions). Distributions on and after the Recordkeeping Combination Date shall not be separately administered and shall be administered under Section 9.1(b) of the Plan.

(k) Administration of Death Benefits. The provisions in this Plan concerning the payment of a Participant's Account upon his death prior to the application of his Account for his benefit shall be controlling for the entire

Account (including the Old Kent Account) in the case of a Participant who dies after December 31, 2001. This includes Article 10 and the definition of Beneficiary (Section 2.9). The provisions of the Old Kent Thrift Plan, as it existed immediately prior to its merger into this Plan, shall be controlling with respect to the payment of the Old Kent Account, upon the death of a Participant on or before December 31, 2001 and prior to the application of his accounts in that plan for his benefit. The disposition of any other subaccounts in the Plan (other than the Old Kent Account and its subaccounts) shall be controlled by this Plan.

(l) Application of Forfeitures. Any forfeitures under the Old Kent Thrift Plan that have not been applied pursuant to the provisions of that plan as of the Merger Date, shall be applied as provided in Section 6.2 of this Plan.

(m) Increased Cash-Out Limit. Notwithstanding the merger of the Old Kent Thrift Plan into the Plan, the Old Kent Thrift Plan is hereby deemed amended retroactively to January 1, 1998 to reflect the increased cash-out limit as follows: "$5,000" replaces "$3,500" in Section 7.7(b)(iii) of the Old Kent Thrift Plan. If an Old Kent Thrift Plan participant's benefit became distributable before January 1, 1998 but had not been paid by January 1, 1998, and if the value (determined as of the date of distribution) of his benefit under the Old Kent Thrift Plan does not exceed $5,000, then such benefit shall be paid in a lump sum as soon as

administratively practicable after January 1, 1998.

(n) Required Beginning Date. An Old Kent Thrift Plan participant (other than a 5-percent owner) who attained age 70½ before January 1, 1997, was permitted to elect in writing to stop receiving minimum distribution payments. If payments are suspended, payments shall recommence by the Participant's required beginning date under Section 8.5(d) of this Plan.

(o) ADP/ACP Testing. Notwithstanding the merger of the Old Kent Thrift Plan into the Plan, for all plan years beginning after December 31, 1996, the Old Kent Thrift Plan used the "prior year testing method" to determine compliance with the nondiscrimination tests of sections 401(k) and 401(m) of the Code. Such testing for the Old Kent Thrift Plan's plan year ending December 31, 2001 shall be performed separately from such testing for this Plan.

(p) Recordkeeping Combination Date. For purposes of this Appendix, "Recordkeeping Combination Date" means the date determined by the Administrator or its delegate, subsequent to the Merger Date, as of which the ongoing recordkeeping associated with the Old Kent Accounts is combined with the ongoing recordkeeping associated with the Plan as a whole.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has

caused this Amendment to be adopted as of this 15 day of November, 2002.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

998780.1

THIRD AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Section 4.1(a) is amended in its entirety effective January 1, 2003 to read as follows:

4.1 Compensation Reduction Contributions.

(a) Compensation Reduction.

(1) Regular 401(k) Contributions. Each Participant may enter into a compensation reduction agreement with his Employer whereby he authorizes his Employer to reduce his Deferrable Compensation or any part thereof, by such percentage or dollar amount prospectively as he shall specify. Such an agreement shall remain in effect until the Participant revokes it or changes it. The Administrator may from time to time establish rules with respect to compensation reduction contributions hereunder, including but not limited to, rules restricting the amount by which compensation may be reduced, rules restricting such contributions to Participants whose pay is paid through the Fifth Third payroll system, and rules respecting the time for filing forms. In accordance with such rules and procedures as the Administrator deems appropriate, the Employer may treat a

Participant as having made a compensation reduction election unless and until a Participant affirmatively elects to revoke or revise such deemed compensation reduction election. The maximum compensation reduction for any pay period or for any payment of Deferrable Compensation when combined with voluntary after-tax contributions (if any) under Section 4.5 of the Plan shall be 20%.

(2) Catch-Up Contributions. Each "Catch-Up Eligible Participant," as defined below, shall be eligible to make catch-up contributions in accordance with, and subject to the limitations of, section 414(v) of the Code. Such catch-up contributions shall not be taken into account for purposes of the provisions of the Plan implementing the required limitations of sections 402(g) and 415 of the Code. The Plan shall not be treated as failing to satisfy the provisions of the Plan implementing the requirements of section 401(k)(3), 401(k)(11), 401(k)(12), 410(b), or 416 of the Code, as applicable, by reason of the making of such catch-up contributions. "Catch-Up Eligible Participant" means a Participant who is age 50 or older and for this purpose a Participant who is projected to attain age 50 before the end of a calendar year is deemed to be age 50 as of January 1 of such year.

Catch-up contributions (including catch-up contributions later re-characterized as regular section 401(k) contributions) shall not be eligible for matching contributions under Section 4.4.

2. Section 4.4(a) is amended effective January 1, 2003 by changing the cross-reference to "Section 4.1" each time it occurs to "Section 4.1(a)(1)."

3. Section 4.5(a) is amended effective January 1, 2003 by adding the following thereto:

> The maximum voluntary after-tax contribution for any pay period or for any payment of Deferrable Compensation when combined with regular section 401(k) contributions (if any) under Section 4.1(a)(1) of the Plan shall be 20%.

4. Article 13 of the Plan is amended by adding a new Section 13.5 to read as follows:

13.5 EGTRRA Modifications.

(a) Effective Date. This Section shall apply for purposes of determining whether the Plan is a top-heavy plan under section 416(g) of the Code for Plan Years beginning after December 31, 2001, and whether the Plan satisfies the minimum benefits requirements of section 416(c) of the Code for such years. This Section amends Article 13 of the Plan.

(b) Determination of Top-Heavy Status.

(1) Key Employee. Key employee means any employee or former employee (including any deceased employee) who at any time during the Plan Year that includes the determination date was an officer of the employer having annual compensation greater than $130,000 (as adjusted under section 416(i)(1) of the Code for Plan Years beginning after December 31, 2002), a 5-percent owner of the employer, or a 1-percent owner of the employer having annual compensation of more than $150,000. For this purpose, annual compensation means compensation within the meaning of section 415(c)(3) of the Code. The determination of who is a key employee will be made in

accordance with section 416(i)(1) of the Code and the applicable regulations and other guidance of general applicability issued thereunder.

(2) Determination of Present Values and Amounts. This Section 13.5(b)(2) shall apply for purposes of determining the present values of accrued benefits and the amounts of account balances of employees as of the determination date.

(A) Distributions During Year Ending on the Determination Date. The present values of accrued benefits and the amounts of account balances of an employee as of the determination date shall be increased by the distributions made with respect to the employee under the Plan and any plan aggregated with the Plan under section 416(g)(2) of the Code during the 1-year period ending on the determination date. The preceding sentence shall also apply to distributions under a terminated plan which, had it not been terminated, would have been aggregated with the Plan under section416(g)(2)(A)(i) of the Code. In the case of a distribution made for a reason other than separation from service, death, or disability, this provision shall be applied by substituting "5-year period" for "1-year period."

(B) Employees not Performing Services During Year Ending on the Determination Date. The accrued benefits and accounts of any individual who has not performed services for the employer during the 1-year period ending on the determination date shall not be taken into account.

(c) Minimum Benefits. Employer matching contributions shall be taken into account for

purposes of satisfying the minimum contribution requirements of section 416(c)(2) of the Code and the Plan. The preceding sentence shall apply with respect to matching contributions under the Plan or, if the Plan provides that the minimum contribution requirement shall be met in another plan, such other plan. Employer matching contributions that are used to satisfy the minimum contribution requirements shall be treated as matching contributions for purposes of the actual contribution percentage test and other requirements of section 401(m) of the Code.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 9 day of January, 2003.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1052812.2

FOURTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. QNEC. In order to allow the Employer to make qualified nonelective contributions, the Plan is amended in the following respects effective December 31, 2001:

(a) **Section 2.3(a)(1) is amended in its entirety to read as follows:**

> (1) The amount of the Employee's voluntary after-tax Participant contributions actually contributed under Section 4.5(a)(1) during the Plan Year, plus any amounts contributed on behalf of each such Employee under Section 4.5(a)(2), to

(b) **Section 4.5(a), as amended by the Third Amendment, is amended by placing the current text in a subparagraph (1) with the heading "Participant Contributions." and by adding a new subparagraph (2) to read as follows:**

(2) QNEC.

(A) The Employer, in its sole discretion, may contribute, for allocation to the Section 401(k) Salary Deferral Accounts of those Participants entitled under (B) below to receive an allocation, such amount as it determines appropriate to satisfy the nondiscrimination test of section 401(m)(2) of the Code and (b) below. Any such contribution shall be allocated as of the last day of the Plan Year for which the Employer makes the contribution.

(B) Participants who are Employees at any time during the Plan Year and who are not Highly Compensated Employees shall be qualified to receive an allocation of any contribution under (A) above for a Plan Year; provided that any such contribution shall be allocated by making the maximum permissible allocation permitted under Article 5 beginning with the Participant with the least Section 415 Compensation (as defined in Section 5.1(d)) and continuing such maximum

permissible allocation to each such Participant in order of Section 415 Compensation (least Section 415 Compensation to greatest Section 415 Compensation) until the entire contribution is allocated.

This type of contribution is nonforfeitable when made (see Section 6.1(c)) and is subject to the withdrawal and distribution limitations of Section 8.6.

2. **Testing Methods During Remedial Amendment Period. In order to clarify the ADP/ACP testing methods used, the Plan is amended in the following respects:**

(a) **Section 4.3(c)(1) is amended in its entirety to read as follows, a new Section 4.3(c)(2) is added to read as follows and existing Section 4.3(c)(2) is re-designated as Section 4.3(c)(3):**

(1) Prior Year Testing. Effective for Plan Years beginning after December 30, 2001, the Actual Deferral Percentage for any Plan Year for Participants who are Highly Compensated Employees shall not exceed the greater of:

(A) 1.25 times the Actual Deferral Percentage for the preceding Plan Year for all the Participants who were

Non-highly Compensated Employees or

(B) the lesser of:

(i) 2 times the Actual Deferral Percentage for the preceding Plan Year for the Participants who were Non-highly Compensated Employees, provided that the Actual Deferral Percentage for the Participants who are Highly Compensated Employees shall not exceed the Actual Deferral Percentage for the preceding Plan Year for Participants who were Non-highly Compensated Employees by more than 2 percentage points; or

(ii) such amount as the Secretary of Treasury may prescribe to prevent multiple use of this alternative limitation with

respect to any Highly Compensated Employee for Plan Years beginning before January 1, 2002. In no event, however, shall the multiple use of this alternative limitation as between the Employer matching contributions under Section 4.4 and the remainder of the Plan be prohibited.

(2) Current Year Testing. For Plan Years beginning after December 31, 1996 and before December 31, 2001, the limitations of (1)(A) and (B) above were applied by reference to the current year (rather than prior year) Actual Deferral Percentages for Participants who were Non-highly Compensated Employees.

(b) **Sections 4.4(c)(1) and 4.5(b)(1) are amended by replacing their headings "Prior Year Testing" with "Current Year Testing" and by replacing the phrase "preceding Plan Year" with "current Plan Year" at each occurrence.**

3. **Sale of Universal Savings Bank, F.A. In order to reflect the sale of Universal Savings Bank, F.A., the Plan is amended effective October**

31, 2002 by adding a new Section 3 to Appendix XIX to read as follows:

3. Sale of Universal Savings Bank. F.A. Due to the sale of 100% of the outstanding shares of capital stock of Universal Savings Bank, F.A. ("Universal") on October 31, 2002, Universal is no longer a subsidiary of Fifth Third Bancorp, and therefore, is no longer an Employer under the Plan. As such, after October 31, 2002, employees of Universal are no longer "Employees" under the Plan. In order to make Participants who, on and after October 31, 2002 were employees of Universal eligible to take distributions under the Plan, such Universal employees shall be considered to have incurred a termination of employment under Section 8.3 of the Plan on October 31, 2002.

4. **Sale of Fifth Third Insurance Services, Inc. In order to reflect the sale of Fifth Third Insurance Services, Inc. and special provisions associated with such sale, Appendix XVIII is amended effective December 31, 2002, by adding a new Section 3 to read as follows:**

3. Sale of Fifth Third Insurance Services. Inc.

(a) Cessation of Active Participation. Due to the sale of 100% of the outstanding shares of capital stock of Fifth Third Insurance Services, Inc. ("Insurance Sub") on December 31, 2002, Insurance Sub is no longer a subsidiary of Fifth Third Bancorp, and

therefore, is no longer an Employer under the Plan. As such, after December 31, 2002, employees of Insurance Sub are no longer "Employees" under the Plan.

(b) Vesting. Notwithstanding any other provisions to the contrary, a Participant who was an employee of Insurance Sub on December 31, 2002 and who continued as an employee of Insurance Sub (and not of an Employer) immediately after the sale, shall have a nonforfeitable right to 100% of his Account (including each of its subaccounts).

(c) Distributable Event. In order to make Participants who, on and after December 31, 2002, were employees of Insurance Sub eligible to take distributions under the Plan, such Insurance Sub employees shall be considered to have incurred a termination of employment under Section 8.3 of the Plan immediately after December 31, 2002.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 6 day of March, 2003.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1094990.1

FIFTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended effective June 1, 2003, by adding a new Section 7.7 to read as follows:

> "7.7 Separately Allocable Plan Expenses. The Administrator may direct that any expenses attributable to specific Participants' Accounts due to investment elections, loans, withdrawals, distributions, domestic relations orders or any other reasons, be deducted directly from the Account for which the expense was incurred to the extent paid from Plan Assets."

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 20 day of June, 2003.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1117094.1

SIXTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended by changing paragraph 2 of Appendix XV (Enterprise Federal Savings Bank/Financial Institutions Retirement Fund) in its entirety, effective December 31, 2002, to read as follows:

> 2. Profit Sharing Contributions. Notwithstanding anything in the Plan to the contrary, Enterprise Federal Employees shall not be considered "Eligible Participants" under Section 4.2 of the Plan and shall not be entitled to receive an allocation of the Employer contribution under Section 4.2 of the Plan for any Plan Year beginning before December 31, 2002. For Plan Years beginning December 31, 2002 and later, this exclusion shall no longer apply.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 10th day of November, 2003.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Director of Legal/Human Resources

1129990.1

SEVENTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Amendments to Compensation Definitions.

(a) Section 2.8 is amended in its entirety to read as follows effective December 31, 2003:

2.8 "Annual Compensation" means the remuneration (before reduction for withheld amounts) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer during a Plan Year, from and after becoming a Participant, in the form of base wages or salary, overtime, variable compensation, and similar compensation, but excluding payments made pursuant to product-focused incentive plans, Jeanie maintenance payments, tuition refund reimbursements, Benefit Choice Dollars and similar payments and benefits. Performance-based additional cash compensation incentives (other than variable compensation) shall be

excluded from Annual Compensation unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all Employees or all Non-Highly Compensated Employees covered by such incentive program.

Solely for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage, the Administrator, in its discretion, may use the definition of "Annual Compensation" set forth in the above paragraph, or the following definition. If the Administrator so determines, "Annual Compensation" for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage shall mean the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code) which is paid by the Employer to an Employee during a Plan Year including amounts that otherwise would have been included within this definition but for section 402(a)(8) of the Code (relating to a salary reduction election under section 401(k) of the Code), section 125 of the Code (relating to the cafeteria or flexible

benefit plans), section 132(f)(4), section 402(h) of the Code (relating to SEPs), section 403(b) of the Code (relating to certain tax deferred annuities), section 457(b) of the Code (relating to deferred compensation plans of state and local governments and tax-exempt organizations), section 414(h)(2) of the Code (relating to certain picked-up employee contributions).

For any Plan Year, only the first $205,000 (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Annual Compensation shall be taken into account.

(b) **Section 2.12 is amended effective December 31, 2003 by changing the last clause in the first sentence to read: "plus, for the January 2, 2004 payday only, Benefit Choice Dollars allocable to periods after becoming a Participant (without regard to how the Participant elects to utilize such Benefit Choice Dollars)."**

2. New Performance-Based Profit Sharing.

(a) **Section 4.2 is amended effective December 31, 2003 by changing the heading to read "Profit Sharing Contributions Before 2004" and by changing subsection (a) in its entirety to read as follows:**

(a) General. For each Plan Year beginning before December 31, 2003, the Board of Directors of Fifth Third Bancorp shall determine the amount to be contributed to the Plan for allocation under this Section 4.2, subject to Article 5 and this Article 4. This

Section 4.2 shall no longer apply after December 30, 2003.

(b) **Sections 4.9 and 4.10 are deleted effective December 30, 2003, and a new Section 4.9 is added effective January 1, 2004 to read as follows:**

4.9 Performance Reward Contributions Effective 2004.

(a) General. For each Plan Year beginning after December 31, 2003, the Board of Directors of Fifth Third Bancorp shall determine the amount to be contributed to the Plan for allocation under this Section 4.9, subject to Article 5 and this Article 4.

(b) Allocation Among Employers. Each Employer shall contribute under the Plan the total contribution allocable to its Eligible Participants.

(c) Participants Entitled to Receive an Allocation of Employer Contribution. A Participant shall be an "Eligible Participant" and shall be entitled to receive an allocation of the Employer contribution to the Plan under (a) above for a Plan Year if he:

(1) is in the employment of an Employer on the last day of such Plan Year;

(2) died during such Plan Year and prior to the termination of his employment;

(3) retired on or after his reaching Normal Retirement Age during such Plan Year;

(4) retired on or after his reaching Early Retirement Age during such Plan Year;

(5) incurred a Disability and retired as a result thereof during such Plan Year; or

(6) is on leave of absence at the close of such Plan Year, if he received compensation from an Employer during such Plan Year.

(d) Allocation Formula. Subject to the limitations of Article 5, as of the last day of a Plan Year, there shall be allocated to the Performance Reward Account of each Participant qualified, under (c) above, to receive such an allocation that portion of the Employer's contribution under (a) above for such Plan Year that bears the same ratio to the total amount of such contribution as the Annual Compensation of such Participant for such Plan Year bears to the total amount of the Annual Compensation for all such Participants for such Plan Year.

(c) **Section 2.1 is amended in its entirety effective January 1, 2004 to read as follows:**

2.1 "Account" means, with respect to a Participant, his allocable share of the Plan Assets. A Participant's Account under the Plan

may include one or more of the following subaccounts:

(a) After-Tax Account;

(b) Employer Matching Account;

(c) Frozen Cash Election Account;

(d) Frozen Vesting Account;

(e) Performance Reward Account;

(f) Profit Sharing Account;

(g) Rollover Account; and

(h) Section 401(k) Salary Deferral Account.

A Participant's Account also may include applicable subaccounts as specified under an Appendix to the Plan. A Participant's account, if any, under a Predecessor Plan which merges into, or makes transfers to, this Plan, shall be allocated to the appropriate subaccounts as determined by the Administrator. The establishment and maintenance of separate Accounts under the Plan is for accounting purposes, and a segregation and separate investment of each Account shall not be required.

(d) **Section 2.16 is amended in its entirety effective January 1, 2004 to read as follows:**

2.16 "Eligible Participant" means a Participant, described in Section 4.2(c) or 4.9(c), who is qualified to receive an allocation of the

Employer contribution under Section 4.2 or 4.9, as the case may be, for a Plan Year. As provided in an applicable Appendix, certain individuals may be excluded from the term "Eligible Participant"

(e) **A new Section 2.34 is added to Article 2 effective January 1, 2004 to read as follows and existing Section 2.34 and each subsequent Section in Article 2 are re-numbered accordingly:**

2.34 "Performance Reward Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years after 2003 under Section 4.9 and forfeitures allocated thereto as adjusted in accordance with Article 7.

(f) **Section 2.38 (2.39 after the re-numbering referred to above) is amended in its entirety effective December 30, 2003 to read as follows:**

2.39 "Profit Sharing Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years after 1996 and before 2004 under Section 4.2(d) and forfeitures allocated thereto as adjusted in accordance with Article 7.

(g) **Section 6.1(f) is amended effective January 1, 2004 by changing the heading to "<u>Frozen Vesting Account, Performance Reward Account and Employer Matching Account</u>" and by changing "Frozen Vesting Account" to "Frozen Vesting Account, Performance Reward Account**

and Employer Matching Account" at each occurrence in Section 6.1(f)(1),(2)(B), (3), and (5).

(h) **Section 6.1(f)(2)(A) is amended in its entirety effective January 1, 2004 to read as follows:**

(A) Vesting Schedule.

(i) Frozen Vesting Account. Subject to (6) below, a Participant who has credit for any Service on or after the Effective Date shall have a nonforfeitable right to a percentage of his Frozen Vesting Account on the basis of the number of Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 3	0%
3	30%
4	40%
5	60%
6	80%
7 or more	100%

If a Participant is reemployed after incurring a forfeiture, any balance remaining in his Frozen Vesting Account at the time of such reemployment shall be separately accounted for, shall be nonforfeitable, and shall not be subject to the above vesting schedule.

A Participant who does not have credit for any Service on or after the Effective Date shall have the vested percentage of his Frozen Vesting

Account determined under the applicable provisions of the Old Plan.

(ii) Performance Reward Account. A Participant shall have a nonforfeitable right to a percentage of his Performance Reward Account on the basis of the number of Vesting Years with which he is credited, pursuant to the following schedule:

Vesting Years	Nonforfeitable Percentage
Less than 5	0%
5 or more	100%

(iii) Employer Matching Account. Subject to Section 6.1(e) above, a Participant shall have a nonforfeitable right to a percentage of his Employer Matching Account on the basis of the number of Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 3	0%
3 or more	100%

(i) **Section 13.3(a) is amended in its entirety effective January 1, 2004 to read as follows:**

(a) Top-Heavy Years. Anything in Article 6 to the contrary notwithstanding, for any Plan Year for which the Plan is a Top-Heavy Plan, a Participant who has at least one Hour of Service after the Plan becomes a Top-Heavy Plan shall have a nonforfeitable right to a

percentage of his Frozen Vesting Account and Performance Reward Account determined under the following tables; provided however, no Participant's vested percentage (as of the day before the Plan's becoming a Top-Heavy Plan) shall be reduced:

Frozen Vesting Account Table

Vesting Years	Nonforfeitable Percentage
Less than 2	0%
2	20%
3	40%
4	60%
5	80%
6 or more	100%

Performance Reward Account Table

Vesting Years	Nonforfeitable Percentage
Less than 3	0%
3 or more	100%

(j) **Section 13.3(b)(i) is amended effective January 1, 2004 by changing "Frozen Vesting Account" to "Frozen Vesting Account and Performance Reward Account."**

(k) **Section 6.1(e) is amended in its entirety to read as follows:**

(e) Pre-2004 Employer Matching Account. Notwithstanding Section 6.1(f)(2) below, but subject to Section 6.1(f)(6) below, a Participant's rights to his Employer Matching Account on or before December 31, 2003 shall be

nonforfeitable at all times. Any balance in the Participant's Employer Matching Account as of December 31, 2004 shall be separately accounted for, shall be nonforfeitable and shall not be subject to the vesting schedule in Section 6.1(f)(2)(A) below.

3. Revised Eligibility.

(a) **Section 3.1 is amended in its entirety effective January 1, 2004 to read as follows:**

3.1 Eligibility and Participation.

(a) For Performance Reward Contributions and Rollovers. Each Employee shall become a Participant as of the date on which he has credit for at least one Hour of Service.

(b) For 401(k) Contributions, Matching Contributions and After-Tax Contributions. Notwithstanding (a) above, an Employee with an Employment Commencement Date on or after January 1, 2004 shall be eligible to make 401(k) Contributions under Section 4.1, to receive matching contributions under Section 4.4 and to make after-tax contributions under Section 4.5 only on and after the first pay date following his completion of 30 days of Eligibility Service. If an Employee terminates employment after completing 30 days of Eligibility Service and is later re-employed as an Employee, he shall be eligible for such contributions beginning with the first pay date after such re-employment provided he still has credit for 30 days of Eligibility Service.

(b) **Section 4.1(a)(1) and Section 4.4(a) are amended effective January 1, 2004 by changing "Each Participant" to "Each Participant who has met the eligibility requirements of Section 3.1(b)."**

4. Revised Match. **Section 4.4(a) is amended in its entirety effective January 1, 2004 to read as follows:**

(a) Pay Period Match. The Employer shall make matching contributions to the Employer Matching Accounts of each Participant who has compensation reduction contributions made on his behalf under Section 4.1 for any pay period. The amount of such matching contributions shall be calculated by reference to so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed four percent (4%) of the Participant's Deferrable Compensation otherwise payable for such pay period.

The Employer matching contribution shall equal one hundred percent (100%) of so much of the Participant's compensation reduction contributions under Section 4.1 for such pay period as do not exceed four percent (4%) of the Participant's Deferrable Compensation otherwise payable for such pay period.

In the event the rate of matching contribution (determined after corrective distribution of elective deferrals under sections 401(k) or (m) or 402(g) of the Code) is determined by the

Administrator to be discriminatory in favor of one or more Highly Compensated Employees, the Administrator shall forfeit that part of such matching contribution (as adjusted in accordance with Article 7) as is necessary to make such rate nondiscriminatory (and in such a case the contributions shall be disregarded under the Plan's provisions relative to sections 401(k)(3) and 401(m)(2) of the Code).

For Plan Years beginning after December 30, 2001, a Participant who is otherwise eligible for the pay period match as described above but who is required to stop his compensation reduction contribution by reason of having reached the adjusted $10,500 limit under Section 4.3(d) above (and section 402(g) of the Code) nevertheless may qualify for the subsequent pay period matches in the Plan Year by making voluntary after-tax contributions out of his Deferrable Compensation. When a Participant reaches such limit, the Administrator may treat his 401(k) compensation reduction election as an election to make voluntary after-tax contributions unless and until the Participant revokes or revises such deemed election. Such match shall be calculated and administered under this Section 4.4(a) by treating the Participant's voluntary after-tax contributions made from his Deferrable Compensation after having reached such limit as if they were compensation reduction contributions under Section 4.1.

5. Forfeitures. **Section 6.2 is amended in its entirety effective January 1, 2004, to read as follows:**

6.2 Allocation of Forfeitures. Forfeitures occurring during a Plan Year, first, shall be applied under Section 6.1(f)(5)(B) to the restoration of forfeitures and then, to the reduction of the Employer's contributions to the Plan.

6. Diversification of Match.

(a) **Section 7.3 is amended in its entirety effective January 1, 2004 to read as follows:**

7.3 Diversification Election. Each Participant may elect the manner in which his Employer Matching Account is invested from among such investment funds as the Administrator directs the Trustee to make available under Section 7.1(c). Although matching contributions will be made into the Fifth Third Stock Fund (and a Participant may not direct that matching contributions be made to any of the other investment funds available under the Plan), after contribution, the Participant may elect for such amounts to be moved from the Fifth Third Stock Fund to such other investment funds, as he directs. In all events, the Administrator shall direct the Trustee to make available at least three investment funds in addition to the Fifth Third Stock Fund (as defined below).

An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules consistent

with the requirements of section 401(a)(28) of the Code including rules which limit the frequency of changes to elections, prescribe times for making elections or regulate the amount of increment a Participant may allocate to a particular fund.

7. Plan Loan Availability. **Section7.6(b)(2) is amended effective January 1, 2004 by adding the following sentence at the end thereof:**

A loan made after December 31, 2003 shall be available at the request of the Participant (subject to the other requirements of this Section 7.6) and shall not be limited to the circumstances described above in this Section 7.6(b)(2).

8. **Section 9.1(b)(3) is amended in its entirety effective January 1, 2004 to read as follows:**

(3) with respect to a Participant whose employment terminates on or after his reaching Early Retirement Age, a partial cash withdrawal, no more frequent than once per Plan Year, of the portion of the Participant's vested Account the Participant specifies, with the remaining portion of the Participant's vested Account balance deferred until future payment under the terms of the Plan, or

9. Change Back to Calendar Plan Year. **Section 2.36 (2.37 after the re-numbering referred to above) is amended in its entirety effective December 30, 2003 to read as follows:**

2.37 "Plan Year" means:

(a) For Plan Years beginning after December 30, 1999 and before December 31, 2003, the 12-month period commencing on December 31 and ending on December 30;

(b) For the Plan Year beginning on December 31, 2003, the period commencing and ending on December 31, 2003; and

(c) For Plan Years beginning after December 31, 2003, the calendar year.

10. Testing Methods During Remedial Amendment Period. **In order to clarify the ADP testing methods used, the Plan is amended in the following respects:**

(a) Section 4.3(c)(1) is amended by changing "Effective for Plan Years beginning after December 30, 2001" to "Effective for the December 31, 2001 through December 30, 2002 Plan Year".

(b) Section 4.3(c)(2) is amended by changing "For Plan Years beginning after December 31, 1996 and before December 31, 2001," to "For Plan Years beginning after December 31, 1996 and before December 31, 2001 and for Plan Years beginning after December 30, 2002,".

(c) Section 4.3(b) is amended in its entirety effective December 31, 2002 to read as follows:

(b) QNEC.

(1) The Employer, in its sole discretion, may contribute, for allocation to the Section 401(k) Salary Deferral Accounts of those Participants entitled under (2) below to receive an allocation, such amount as it determines appropriate to satisfy the nondiscrimination test of section 401(k)(3) of the Code and (c) below. Any such contribution shall be allocated as of the last day of the Plan Year for which the Employer makes the contribution.

(2) Participants who are Employees at any time during the Plan Year and who are not Highly Compensated Employees shall be qualified to receive an allocation of any contribution under (1) above for a Plan Year; provided that any such contribution shall be allocated by making the maximum permissible

allocation permitted under Article 5 beginning with the Participant with the least Section 415 Compensation (as defined in Section 5.1(d)) and continuing such maximum permissible allocation to each such Participant in order of Section 415 Compensation (least Section 415 Compensation to greatest Section 415 Compensation) until the entire contribution is allocated.

This type of contribution is nonforfeitable when made (see Section 6.1(c)) and is subject to the withdrawal and distribution limitations of Section 8.6.

11. Transfer from AmeriBank Pension Plan. **Article 4 is amended effective December 30, 2003 by adding a new Section 4.10 to read as follows:**

4.10 Transfer of Excess Plan Assets from the AmeriBank Pension Plan. After satisfaction of all liabilities of the terminated AmeriBank Pension Plan (the "AmeriBank Plan") the

sponsor of which is Fifth Third Bank, Indiana, an Affiliate, and before (or instead of) accepting a reversion of excess assets from the AmeriBank Plan, the Employer may transfer directly to the Plan, and the Plan shall accept, such excess assets as the Employer elects. Such transferred excess assets shall be allocated at the Employer's discretion either as matching contributions under Section 4.4, profit sharing contributions under Section 4.2 or performance reward contributions under Section 4.9, reducing the amount the Employer would otherwise contribute under such Sections. Such allocation shall occur in the year of transfer and shall satisfy the requirements of Sections 401(a)(4) and 415 of the Code.

This Section 4.10 is intended to comply with Section 4980 of the Code and Revenue Ruling 2003-85.

12. Adoption of Required Minimum Distribution Model Amendment. **Section 9.9 is amended by changing the heading to read "Minimum Distributions under 2001 Proposed Regulations" and a new Section 9.10 is amended effective January 1, 2003 to read as follows:**

9.10 New Minimum Distribution Requirements.

(a) General Rules.

(1) Effective Date. The provisions of this Section will apply for purposes of determining required minimum distributions

for calendar years beginning with the 2003 calendar year.

(2) Precedence. The requirements of this Section will take precedence over any inconsistent provisions of the Plan.

(3) Requirements of Treasury Regulations Incorporated. All distributions required under this Section will be determined and made in accordance with the Treasury Regulations under section 401(a)(9) of the Code.

(4) TEFRA Section 242(b)(2) Elections. Notwithstanding the other provisions of this Section, distributions may be made under a designation made before January 1, 1984, in accordance with section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act (TEFRA) and the provisions of the Plan that relate to section 242(b)(2) of TEFRA.

(b) Time and Manner of Distribution.

(1) Required Beginning Date. The Participant's entire interest will be distributed, or begin to be distributed, to the Participant no later than the Participant's required beginning date.

(2) Death of Participant Before Distributions Begin. If the participant dies before distributions begin, the Participant's entire interest will be distributed, or begin to be distributed no later than as follows:

(A) If the Participant's surviving spouse is the Participant's sole designated Beneficiary, then, distributions to the surviving spouse will begin by December 31 of the calendar year immediately following the calendar year in which the Participant died, or by December 31 of the calendar year in which the Participant would have attained age 70 ½, if later.

(B) If the Participant's surviving spouse is not the Participant's sole designated Beneficiary, then, distributions to the designated Beneficiary will begin by December 31 of the calendar year immediately following the calendar year in which the Participant died.

(C) If there is no designated Beneficiary as of September 30 of the year following the year of the Participant's death, the Participant's entire interest will be distributed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.

(D) If the Participant's surviving spouse is the Participant's sole designated Beneficiary and the surviving spouse dies after the Participant but before distributions to the surviving spouse begin, this Section 9.10(b)(2), other than Section 9.10(b)(2)(A), will apply as if the surviving spouse were the Participant.

For purposes of this Section 9.10(b)(2) and Section 9.10(d), unless Section 9.10(b)(2)(D) applies, distributions are considered to begin on the Participant's required beginning date. If Section 9.10(b)(2)(D) applies, distributions are considered to begin on the date distributions are required to begin to the surviving spouse under Section 9.10(b)(2)(A). If distributions under an annuity purchased from an insurance company irrevocably commence to the Participant before the Participant's required beginning date (or to the Participant's surviving spouse before the date distributions are required to begin to the surviving spouse under Section 9.10(b)(2)(A)), the date distributions are considered to begin is the date distributions actually commence.

(3) Forms of Distribution. Unless the Participant's interest is distributed in the form of an annuity purchased from an insurance company or in a single sum on or before the required beginning date, as of the first distribution calendar year distributions will be made in accordance with Sections 9.10(c) and (d). If the Participant's interest is distributed in the form of an annuity purchased from an insurance company, distributions thereunder will be made in accordance with the requirements of section 401(a)(9) of the Code and the Treasury Regulations.

(c) Required Minimum Distributions During Participant's Lifetime.

(1) Amount of Required Minimum Distribution For Each Distribution

Calendar Year. During the Participant's lifetime, the minimum amount that will be distributed for each distribution calendar year is the lesser of:

(A) the quotient obtained by dividing the Participant's Account balance by the distribution period in the Uniform Lifetime Table set forth in section 1.401(a)(9)-9 of the Treasury Regulations, using the Participant's age as of the Participant's birthday in the distribution calendar year; or

(B) if the Participant's sole designated Beneficiary for the distribution calendar year is the Participant's spouse, the quotient obtained by dividing the Participant's Account balance by the number in the Joint and Last Survivor Table set forth in section 1.401(a)(9)-9 of the Treasury Regulations, using the Participant's and spouse's attained ages as of the Participant's and spouse's birthdays in the distribution calendar year.

(2) Lifetime Required Minimum Distributions Continue Through Year of Participant's Death. Required minimum distributions will be determined under this Section 9.10(c) beginning with the first distribution calendar year and up to and including the distribution calendar year that includes the Participant's date of death.

(d) Required Minimum Distributions After Participant's Death.

(1) Death On or After Date Distributions Begin.

(A) Participant Survived by Designated Beneficiary. If the Participant dies on or after the date distributions begin and there is a designated Beneficiary, the minimum amount that will be distributed for each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's Account balance by the longer of the remaining life expectancy of the Participant or the remaining life expectancy of the Participant's designated Beneficiary, determined as follows:

(i) The Participant's remaining life expectancy is calculated using the age of the Participant in the year of death, reduced by one for each subsequent year.

(ii) If the Participant's surviving spouse is the Participant's sole designated Beneficiary, the remaining life expectancy of the surviving spouse is calculated for each distribution calendar year after the year of the Participant's death using the surviving spouse's age as of the spouse's birthday in that year. For distribution calendar years after the year of the surviving spouse's death, the remaining life expectancy of the surviving spouse is calculated using the age of the surviving spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each subsequent calendar year.

(iii) If the Participant's surviving spouse is not the Participant's sole designated Beneficiary, the designated Beneficiary's remaining life expectancy is calculated using the age of the Beneficiary in the year following the year of the Participant's death, reduced by one for each subsequent year.

(B) No Designated Beneficiary. If the Participant dies on or after the date distributions begin and there is no designated Beneficiary as of September 30 of the year after the year of the Participant's death, the minimum amount that will be distributed for each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's Account balance by the Participant's remaining life expectancy calculated using the age of the Participant in the year of death, reduced by one for each subsequent year.

(2) Death Before Date Distributions Begin.

(A) Participant Survived by Designated Beneficiary. If the Participant dies before the date distributions begin and there is a designated Beneficiary, the minimum amount that will be distributed for each distribution calendar year after the year of the Participant's death is the quotient obtained by dividing the Participant's Account balance by the remaining life expectancy of the Participant's designated Beneficiary, determined as provided in Section 9.10(d)(1).

(B) No Designated Beneficiary. If the Participant dies before the date distributions begin and there is no designated Beneficiary as of September 30 of the year following the year of the Participant's death, distribution of the Participant's entire interest will be completed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.

(C) Death of Surviving Spouse Before Distributions to Surviving Spouse Are Required to Begin. If the Participant dies before the date distributions begin, the Participant's surviving spouse is the Participant's sole designated Beneficiary, and the surviving spouse dies before distributions are required to begin to the surviving spouse under Section 9.10(b)(2)(A), this Section 9.10(d)(2) will apply as if the surviving spouse were the Participant.

(e) Definitions.

(1) Designated Beneficiary. The individual who is designated as the Beneficiary under Section 2.9 of the Plan and is the designated Beneficiary under section 401 (a)(9) of the Code and section 1.401 (a)(9)-1, Q&A-4, of the Treasury Regulations.

(2) Distribution Calendar Year. A calendar year for which a minimum distribution is required. For distributions beginning before the Participant's death, the first distribution calendar year is the calendar

year immediately preceding the calendar year which contains the Participant's required beginning date. For distributions beginning after the Participant's death, the first distribution calendar year is the calendar year in which distributions are required to begin under Section 9.10(b)(2). The required minimum distribution for the Participant's first distribution calendar year will be made on or before the Participant's required beginning date. The required minimum distribution for other distribution calendar years, including the required minimum distribution for the distribution calendar year in which the Participant's required beginning date occurs, will be made on or before December 31 of that distribution calendar year.

(3) Life Expectancy. Life expectancy as computed by use of the Single Life Table in section 1.401(a)(9)-9 of the Treasury Regulations.

(4) Participant's Account Balance. The Account balance as of the last valuation date in the calendar year immediately preceding the distribution calendar year (valuation calendar year) increased by the amount of any contributions made and allocated or forfeitures allocated to the Account balance as of dates in the valuation calendar year after the valuation date and decreased by distributions made in the valuation calendar year after the valuation date. The Account balance for the valuation calendar year includes any amounts rolled over or transferred to the Plan either in

the valuation calendar year or in the distribution calendar year if distributed or transferred in the valuation calendar year.

(5) Required Beginning Date. The date specified in Section 8.5(d)(2) of the Plan.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 24th day of December, 2003.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1192712.1

EIGHTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Franklin Financial Corporation. Effective June 11, 2004, a new Appendix XX is added to the Plan in the form attached hereto.

2. Appendix I is amended effective June 11, 2004 by adding the following line item in the chart immediately following the First Ohio Bancshares, Inc. line item:

Franklin Financial Corporation (and subsidiaries)	XX	XX

3. Effective January 1, 2004, all references to Section "2.43" in the Appendices are hereby changed to "2.44."

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 15th day of June, 2004.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1297800.1

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XX

FRANKLIN FINANCIAL CORPORATION

Franklin Employee. For purposes of this Appendix, "Franklin Employee" means an individual who, immediately prior to the merger of Franklin Financial Corporation on June 11, 2004, as contemplated by the Affiliation Agreement dated July 23, 2002 among Fifth Third Bancorp, Fifth Third Financial Corporation and Franklin Financial Corporation, was employed by Franklin Financial Corporation or a subsidiary of Franklin Financial Corporation, as an employee and became an Employee immediately upon the completion of such merger on June 11, 2004.

Eligibility. Notwithstanding Section 3.1(b) of the Plan, a Franklin Employee shall become a Participant for all purposes of the Plan effective as of the close of business on June 11, 2004.

Past Service Credit. Effective June 11, 2004, each Franklin Employee shall be credited with Service under Section 2.44(a)(1), (2) and (3) of the Plan for his service with Franklin Financial Corporation or any subsidiary of Franklin Financial Corporation. Such Service shall be determined under rules comparable to those under Section 2.44(a)(1), (2) and (3) of the Plan.

NINTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended effective January 1, 2005 in the following respects:

1. A new Appendix XXI is added to the Plan in the form attached hereto, and the First National Bankshares of Florida, Inc. Salary Savings Plan is merged into the Plan as of January 1, 2005.

2. Appendix I is amended by adding the following line item in the chart immediately following the First-Mason Bank line item:

First National Bankshares of Florida, Inc. (and subsidiaries)	XXI	XXI

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 30th day of December, 2004.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1380367.2

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX XXI

FIRST NATIONAL BANKSHARES OF FLORIDA, INC. SALARY SAVINGS PLAN

1. Merger of First National Bankshares of Florida, Inc. Salary Savings Plan. Effective as of January 1, 2005 upon the merger of First National Bankshares of Florida, Inc. into Fifth Third Financial Corporation (the "Merger Date"), the First National Bankshares of Florida, Inc. Salary Savings Plan (the "FNB Plan") is completely amended and restated and merged into this Plan. This Plan represents a continuation of the FNB Plan and contributions shall continue as provided in this Plan. Upon the merger, an individual who is not already a Participant (or Beneficiary) but who had an account in the FNB Plan on the Merger Date, shall become a Participant (or Beneficiary). The FNB Plan is a Predecessor Plan such that service taken into account under the FNB Plan shall count as service under Section 2.44 of this Plan.

2. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the FNB Plan shall be separately accounted for under the Plan. A Participant shall have an FNB Account which, as of the Merger Date, shall be equal to his accounts under the FNB Plan as of such date. A Participant's FNB Account shall be adjusted in accordance with Section 7.2 and shall not share in any contributions or forfeitures allocated under the Plan (ongoing contributions under the Plan instead are reflected in the subaccounts referred to in Article 4 of

the Plan). There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his FNB Account as are necessary in order to separately account for the merger of the FNB Plan into the Plan:

(a) an "FNB 401(k) Account," which is attributable to a Participant's "Elective Deferral Contributions" under the FNB Plan, as adjusted in accordance with Section 7.2.

(b) an "FNB Qualified Matching Account," which is attributable to "Qualified Matching Contributions" ("Matching Contributions" made on or after January 1, 2004) under the FNB Plan, as adjusted in accordance with Section 7.2.

(c) an "FNB Pre-2004 Matching Account," which is attributable to "Matching Contributions" made before January 1, 2004 under the FNB Plan, as adjusted in accordance with Section 7.2.

(d) an "FNB Additional Contribution Account," which is attributable to "Additional Contributions" under the FNB Plan other than such amounts credited to the FNB Pre-Spin-Off Additional Contribution Account, as adjusted in accordance with Section 7.2.

(e) an "FNB Pre-Spin-Off Additional Contribution Account," which is attributable to "Additional Contributions" under the FNB Plan, which immediately after the spin-off of First National Bankshares of Florida, Inc. by F.N.B. Corporation, was invested in F.N.B. Corporation stock, as adjusted in accordance with Section 7.2.

(f) an "FNB Rollover Account," which is attributable to a Participant's "Rollover Contributions" under the FNB Plan, as adjusted in accordance with Section 7.2.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's FNB 401(k) Account and FNB Qualified Matching Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

3. Investment of FNB Account.

(a) FNB Additional Contribution Account.

(1) ESOP. Subject to (2) below, the Plan Assets attributable to the FNB Additional Contribution Accounts shall be invested in the Fifth Third Stock Investment Option (as defined below).

(2) Diversification Election. Each Participant who has attained age 55 may elect the manner in which his FNB Additional Contribution Account is to be invested from among such investment funds as the Administrator directs be made available for this purpose. In all events, the Administrator shall direct that at least three investment funds be made available in addition to the Fifth Third Stock Investment Option (as defined below).

An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules consistent with the requirements of section 401(a)(28) of the Code including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or

increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations, and provide for the investment of an FNB Additional Contribution Account of a Participant who fails to make an investment election.

(b) Participant Investment Rights. A Participant shall have Participant-directed investment rights over his FNB 401(k) Account, FNB Qualified Matching Account, FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account and FNB Rollover Account comparable to the Participant-directed investment rights described in Section 7.1(c)(2). Such Participant-directed investment rights applicable to a Participant's FNB Account shall be administered separately from such comparable investment rights as are applicable to other subaccounts under the Plan. The Administrator shall determine the investment options to be made available for the FNB Accounts, which, initially may be some or all of the same investment options as are available under the FNB Plan as of the Merger Date. Such investment funds need not be the same as the investment funds made available for the investment of other subaccounts under the Plan. In all events, the Fifth Third Stock Investment Option, as described in (1) below, shall be one of the available investment options. In all events, the F.N.B. Corporation Stock Investment Option, as described and as restricted in (2) below, shall be one of the available investment options.

(1) Fifth Third Stock Investment Option.

(A) General. The Fifth Third Stock Investment Option shall consist of common stock of Fifth Third Bancorp or a fund invested primarily in such shares. This represents a continuation of the investment option under the FNB Plan of qualifying employer securities (the First National Bankshares of Florida, Inc. common stock became common stock of Fifth Third Bancorp as of the Merger Date).

(B) Voting of Employer Securities. To the extent a Participant's FNB Account is invested under the Fifth Third Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to determine the manner in which his shares (or the shares represented by his interest in any such fund) are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised.

(C) ESOP Designation. The Fifth Third Stock Investment Option shall be part of the Plan's stock bonus plan feature and employee stock ownership plan (as defined in section 4975(e)(7) of the Code) feature.

(D) ESOP Dividend Pass-Through Election. A Participant with an FNB Account (including any subaccount of his FNB Account) invested 'in the Fifth Third Stock Investment Option (or in the event of his death, his Beneficiary), shall have the right to elect, in accordance with instructions or procedures of the Administrator, or its delegate to either (1) leave such dividends in the Plan for reinvestment in common stock of Fifth Third Bancorp

under the Fifth Third Stock Investment Option or otherwise, or (2) take the dividends in cash.

(2) F.N.B. Corporation Stock Investment Option.

(A) General. The F.N.B. Corporation Stock Investment Option shall consist of stock of F.N.B. Corporation or a fund invested primarily in such shares.

(B) Restrictions. No new investments (through investment transfers or otherwise) may be made into the F.N.B. Corporation Stock Investment Option. In accordance with rules or procedures established by the Administrator, a Participant may elect to transfer part or all of his FNB Account out of the F.N.B. Corporation Stock Investment Option and into other investment options as described at 3(b) above. However, such amounts may not be transferred back into the F.N.B. Corporation Stock Investment Option.

(C) Voting of F.N.B. Corporation Stock. To the extent a Participant's FNB Account is invested in the F.N.B. Corporation Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to determine the manner in which the shares are to be voted at each annual or special meeting of the shareholders of F.N.B. Corporation and as to the manner in which any other right relating to such stock is to be exercised.

4. Funding Entities. The Plan Assets attributable to the FNB Plan shall be held under such trusts and/or annuity contracts as the Employer, in its sole discretion, may establish or cause to be established or

entered into for the purposes of carrying out the Plan. The Employer shall determine the form and terms of any such trust and/or annuity contract, from time to time, consistent with the objectives of the Plan, ERISA and any other applicable legal requirements, and may remove any trustee and/or insurance company and select a successor trustee or trustees and/or insurance company or may terminate any such trust and/or annuity contract. Any such trust or annuity contract so established and maintained is and shall be a part of the Plan.

5. Vesting.

(a) Fully Vested Accounts. A Participant's rights to his FNB 401(k) Account, FNB Qualified Matching Account and FNB Rollover Account shall be nonforfeitable at all times.

(b) Vesting Schedule. A Participant shall have a nonforfeitable right to a percentage of his FNB Pre-2004 Matching Account, his FNB Pre-Spin-Off Additional Contribution Account and his FNB Additional Contribution Account on the basis of the number of his Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 1	0%
1	20%
2	40%
3	60%
4	80%
5 or more	100%

Upon and after a Participant's attainment of age 62, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution Account, and his FNB Additional Contribution Account. In addition, the provisions of Section 6.1(f)(2)(B) and (C), (3), (5) and (7) shall apply to a Participant's FNB Pre-2004 Matching Account, FNB Pre-Spin-Off Additional Contribution and his FNB Additional Contribution Account.

(c) Other Vesting Provisions. Notwithstanding paragraph (b) above, a Participant whose position as an Employee was affected by the restructuring of F.N.B. Corporation and who was notified of such before August 20, 2003, shall be fully vested in his entire FNB Account provided his employment continued through the separation date set by his employer.

A Participant whose position is eliminated as a result of the affiliation of First National Bankshares of Florida, Inc. (and subsidiaries) with Fifth Third Bancorp and who receives a benefit under the First National Bankshares of Florida, Inc. Severance Pay Plan, shall be fully vested in his entire FNB Account.

6. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship, he may make withdrawals from his FNB 401(k) Account; provided however, the aggregate of any such withdrawals may not exceed the aggregate of his "Elective Deferral Contributions" under the FNB Plan. For purposes hereof, "hardship" means an immediate and heavy financial need of an Employee, which consists of one of the circumstances described in Sections 8.1(b)(2)(A),

(B), (C) and (D) (but not (E)) of the Plan. A withdrawal based on financial hardship cannot exceed the amount required to satisfy that need (including taxes and penalties on the withdrawal). A withdrawal will be deemed necessary to satisfy an immediate and heavy financial need if and only if all of the following requirements are satisfied:

(a) the withdrawal is not in excess of the amount of the immediate and heavy financial need of the Employee;

(b) the Employee has obtained all withdrawals and distributions (other than hardship withdrawals) and all nontaxable loans currently available under all plans maintained by the Employer;

(c) the Plan, and all other plans maintained by the Employer, provide that the Employee's elective contributions under section 401(k) of the Code and nondeductible employee contributions will be suspended for at least 6 months after receipt of the hardship withdrawal; and

(d) the Plan, and all other plans maintained by the Employer, provide that the Employee may not make elective contributions under section 401(k) of the Code for the Employee's taxable year immediately following the taxable year of the hardship withdrawal in excess of the applicable limit under section 402(g) of the Code for such next taxable year less the amount of such Employee's elective contributions for the taxable year of the hardship withdrawal.

Such a withdrawal shall be made in a single sum.

In the event of a hardship withdrawal hereunder, the Participant shall be suspended from making section 401(k) compensation reduction contributions and voluntary after-tax participant contributions for a period of 6 months.

7. In-Service Withdrawals After Age 59-½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his FNB Account if he has reached age 59½. Such a withdrawal shall be made in a single sum.

8. Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the FNB Plan prior to the Merger Date. A Participant may borrow from his FNB Account, excluding his FNB Additional Contribution Account. Loans shall be subject to Section 7.6 except as follows:

(a) Except for the maximum loan limit under Section 7.6(c), the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from his FNB Account and his loan privileges from the remainder of his Account. As such, the minimum loan from a Participant's FNB Account hereunder is $1,000 and the minimum loan from other available accounts under Section 7.6 is $1,000.

(b) A Participant may have up to two loans outstanding from his FNB Account and up to one loan outstanding from other available subaccounts under Section 7.6. No more than two loans from a Participant's FNB Account shall be approved in any 12-month period.

(c) In addition to the other applicable limits under Section 7.6(c), a loan from the Participant's FNB

Account may not exceed 50 percent of his FNB Account, reduced by any outstanding loan balance on the date the new loan is made.

(d) The Administrator is authorized to administer the loan program as applied to the FNB Account and such administration may vary from the administration otherwise applicable to loans under Section 7.6.

9. Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan to the extent the portion of a Participant's FNB Account is invested in the common stock of Fifth Third Bancorp (or a fund consisting primarily of the common stock of Fifth Third Bancorp), the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his FNB Account.

10. Distribution of F.N.B. Corporation Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's FNB Account is invested in the common stock of F.N.B. Corporation (or a fund consisting primarily of the common stock of F.N.B. Corporation), the Participant (or in the event of his death, his Beneficiary) may elect, in accordance with rules and procedures established by the Administrator, to have shares of F.N.B. Corporation stock distributed to him in any distributions of his FNB Account.

11. Forms of Payment/Administration of Distributions.

(a) Separate Administration. The Administrator shall administer distributions of the FNB Account separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his FNB Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $5,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4, 9.9 and 9.10 (regarding the required beginning date and minimum distributions).

(b) Qualified Joint and Survivor Annuity.

(1) Automatic Form of Payment. The form of payment of a Participant's FNB Account shall be a Qualified Joint and Survivor Annuity (defined in (2) below) if:

(A) the Participant elects payment of benefits in the form of a life annuity, and

(B) the Participant has not waived such Annuity pursuant to (3) below.

(2) Definition of Qualified Joint and Survivor Annuity.

(A) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's

Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse, with installment refund.

(B) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant, with installment refund.

(C) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable FNB Account balance.

(3) Waiver.

(A) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 90-day election period ending on the date as of which his benefit payments are to begin. Such a waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. A Participant may also revoke any waiver under (A) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(C) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 90 days, prior to the date as of which his benefit payments are to begin (and

consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(i) the terms and conditions of the Qualified Joint and Survivor Annuity,

(ii) the Participant's right to make, and the effect of, an election under (A) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of the Participant's spouse under (4) below,

(iv) the right to make, and the effect of, a revocation of an election under (B) above, and

(v) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(4) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(i) acknowledges the effect of such election,

(ii) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(iii) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(iv) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(ii) and (iii) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(c) Optional Forms of Benefit. In addition to the Qualified Joint and Survivor Annuity, a Participant may, by filing the proper form with the Administrator,

elect to receive his vested FNB Account in any of the following forms:

(1) a single sum,

(2) a straight life annuity,

(3) a single life annuity with a certain period of 5, 10 or 15 years,

(4) a single life annuity with installment refund,

(5) a survivorship life annuity with installment refund and a survivorship percentage of 50%, 66-2/3% or 100%,

(6) a fixed period annuity for any period of whole months which is not less than 60 and does not exceed life expectancy (as described in Section 9.5 of the Plan, without recalculation), and

(7) a full flexibility option in which the Participant elects the amount to be distributed each year, subject to a $1,000 minimum and subject to the minimum distribution rules of Section 9.10 of the Plan.

12. Preretirement Survivor Annuity.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, the Participant elects payment of his FNB Account in the form of a life annuity; and

(3) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse with installment refund, in the amount of benefit that can be purchased with 100 percent of the Participant's nonforfeitable FNB Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70½) elected by such Surviving Spouse.

(c) Spouse's Election of Lump Sum or Other Optional Form of Payment. A Surviving Spouse entitled to a Preretirement Survivor Annuity may elect to receive a lump sum payment of the amount that would otherwise be applied to the purchase of such Annuity or any Annuity that is an optional form of retirement benefit. Such election shall be in writing, shall acknowledge its effect, and shall be witnessed by a Plan representative or a notary public.

13. Balance of Death Benefit When Preretirement Survivor Annuity is Not Applicable. Upon the death of a Participant, prior to the commencement of benefit payments from his FNB Account, his Beneficiary shall be entitled to a benefit

equal to his vested FNB Account if the Preretirement Survivor Annuity is not applicable because the Participant had not elected a life annuity, the Participant has no Surviving Spouse or if the Surviving Spouse dies before the Preretirement Survivor Annuity commences. Payment to the Beneficiary shall be in a single sum distribution or any annuity that is an optional form of benefit (except the full flexibility option shall not be available if the Beneficiary is not the spouse of the deceased Participant). The payment of a Participant's FNB Account upon his death shall be administered separately from the payment upon death of his other subaccounts under the Plan. A separate Beneficiary designation form shall be used for the FNB Account and any such forms on file for the FNB Plan as of the Merger Date shall be controlling with respect to his FNB Accounts under this Plan unless and until revoked or replaced in accordance with Plan procedures. The Beneficiary designation form used for the Plan subaccounts other than the FNB Accounts shall not be relevant as to the disposition of the FNB Accounts.

14. Application of Forfeitures. Any forfeitures under the FNB Plan that have not been applied pursuant to the provisions of that plan as of the Merger Date, shall be applied as provided in Section 6.2 of this Plan.

TENTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended effective January 1, 2005 by adding a new Section 3.4 to Article 3 of the Plan to read as follows:

3.4 Ineligible Employees.

(a) Ineligible Class of Employees. Notwithstanding anything to the contrary in this Article 3 or in Article 4, during the time that an Employee falls within one or more of the following classes of Employees, he shall not be eligible to participate in the Plan, or to make or receive allocations of contributions or forfeitures under the Plan:

(1) a nonresident alien who receives no earned income from the Employer which constitutes United States source income, or who does receive such income if all of such income is exempt from United States income tax under an applicable income tax convention; or

(2) an Employee whose position is located primarily (as determined by the Employer) outside the United States.

(b) Change of Employee Classification. In the event an Employee who is a member of an ineligible class, as described in (a) above has a change in employment status so that he is no longer a member of such an ineligible class, he shall be eligible to participate in the Plan and to make or receive allocations, contributions or forfeitures under the Plan immediately provided he meets the requirements of Section 3.1.

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 14th day of December, 2005.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds
Executive Vice President

1470550.1

ELEVENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in order to comply with the requirements of IRS Notice 2005-5 for a good faith amendment in connection with the automatic rollover requirements for mandatory distributions, effective March 28, 2005 with respect to distributions on or after that date, as follows:

1. Section 6.1(f)(5)(A) is amended by replacing "$5,000" with "$1,000."

2. Section 8.5(c)(1) is amended by replacing "$5,000 (or, for distributions prior to October 17, 2000, at the time of any prior distribution exceeded $5,000) (excluding the value of a Participant's Rollover Account for distributions after December 31, 2001)" with "$1,000."

3. Section 8.5(e) is amended in its entirety, as follows:

> "Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount payable to a Participant under the Plan shall be paid in a single sum, provided that the value of the Participant's nonforfeitable benefit under the Plan, determined as of the date of

distribution, does not exceed $1,000, and such payment is made before payment otherwise begins. Such single sum shall be paid as soon as administratively feasible after the amount otherwise becomes distributable under the Plan."

4. Section 9.1(c) is amended by replacing "$5,000 (or, for distributions prior to October 17, 2000 at the time of any prior distribution exceeded $5,000) (excluding the value of a Participant's Rollover Account for distributions after December 31, 2001)" with "$1,000."

5. Section 11(a) of Appendix XXI is amended by replacing "$5,000" with "$1,000."

IN WITNESS WHEREOF, the undersigned Director of Legal/Human Resources of Fifth Third Bank has caused this Amendment to be adopted as of this 15th day of December, 2005.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds
Director of Legal/Human Resources

1555727.1

TWELFTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Effective January 19, 2006, the Plan is amended to add Appendix XXII which reads as attached hereto.

2. Appendix I is amended effective January 19, 2006, by adding the following line item in the chart immediately following the Capital Holdings, Inc. line item:

Card Management Corporation	XXII	XXII

3. Section 12.1(b)(1) is amended effective as of the date hereof to read as follows:

> (b) (1) Amendment Procedure. Any amendment of the Plan shall be by action of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee or the Chairman of such Committee. If an amendment is being made by the Committee, it must be approved by a majority of the members of the Committee as constituted at the time of adoption of the amendment. Any amendment may be given retroactive effect as determined by said Committee or the Chairman. An amendment

may be evidenced in such manner as said Committee or Chairman shall determine. If the amendment is approved by the Committee, such evidence may include (but shall not be limited to) a written resolution signed by a majority of the members of the Committee or minutes of a meeting of the Committee reflecting appro . al by a majority of the members.

IN WITNESS WHEREOF, Fifth Third Bank has caused this Amendment to be adopted as of this 17th day of July, 2006.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds

1659113.1

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

APPENDIX XXII

CARD MANAGEMENT CORPORATION

1. Definitions.

(a) CMC Employee. For purposes of this Appendix, "CMC Employee" means an individual who, immediately prior to the acquisition of stock of Card Management Corporation on January 19, 2006 pursuant to the Stock Purchase Agreement dated December 22, 2005 among Fifth Third Bank, Card Management Corporation and its shareholders, was employed by Card Management Corporation as an employee and became an "Employee" in connection with such acquisition.

(b) New Employee. For purposes of this Appendix, "New Employee" means an individual who is hired by Card Management Corporation after January 19, 2006 thereby becoming an "Employee" (but not a "CMC Employee" as defined above because he was hired after the closing of the stock purchase).

2. Eligibility.

(a) CMC Employees.

(i) For Performance Reward Contributions and Rollovers. As provided in Section 3.1(a) of the Plan, each CMC Employee shall become a Participant as of January 19, 2006, the date he became an

Employee (by reason of the acquisition).

Notwithstanding this participation date, for purposes of determining and allocating Performance Reward Contributions under Section 4.9 for 2006, Annual Compensation for each CMC Employee shall include amounts paid by Card Management Corporation to such individual in 2006 but before the acquisition on January 19, 2006.

(ii) For 401(k) Contributions, Matching Contributions and After-Tax Contributions. Notwithstanding Section 3.1(b) of the Plan and (i) above, a CMC Employee shall be eligible to make 401(k) contributions under Section 4.1, to receive matching contributions under Section 4.4 and to make after-tax contributions under Section 4.5 commencing with the February 17, 2006 pay date.

(b) Eligibility of All Other Employees. Each New Employee shall be subject to the normal eligibility rules in Article 3 of the Plan.

3. Past Service Credit. Effective January 19, 2006, each CMC Employee shall be credited with Vesting Service under Section 2.48(a) of the Plan for his service

with Card Management Corporation. Such service shall be determined under rules comparable to those under Section 2.44(a)(1), (2) and (3).

4. Deferrable Compensation. For purposes of making 401(k) contributions, until such time as a CMC Employee or a New Employee is paid through the Fifth Third payroll system, a different definition of "Deferrable Compensation" shall apply (but the specified dollar limit shall apply). For such purposes, "Deferrable Compensation" shall mean the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code) which is paid by the Employer to an Employee during a Plan Year including amounts that otherwise would have been included within this definition but for section 402(e)(3) of the Code (relating to a salary reduction election under section 401(k) of the Code), section 125 of the Code (relating to the cafeteria or flexible benefit plans), section 132(f)(4), section 402(h) of the Code (relating to SEPs), section 403(b) of the Code (relating to certain tax deferred annuities), section 457(b) of the Code (relating to deferred compensation plans of state and local governments and tax-exempt organizations), section 414(h)(2) of the Code (relating to certain picked-up employee contributions).

5. Annual Compensation. For purposes of allocating performance reward contributions for 2006, a different definition of "Annual Compensation" shall apply with respect to CMC Employees and New Employees. Prior to such time as a CMC Employee or a New Employee is paid through the Fifth Third payroll system, "Annual Compensation" shall have the same meaning as specified in paragraph 4 above. This definition also applies to amounts paid to CMC Employees by Card Management Corporation in 2006 prior to the acquisition on January 19, 2006. When a CMC Employee or a New Employee commences being paid through the Fifth Third payroll system, "Annual Compensation" shall be as specified in Section 2.8 of the Plan. Accordingly, for 2006, subject to the dollar limit specified in Section 2.8, "Annual Compensation" for a CMC Employee or a New Employee shall mean the aggregate of the amounts paid using the definition in paragraph 4 above for periods before he is paid through the Fifth Third payroll system and using the regular definition in Section 2.8 of the Plan thereafter.

THIRTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Effective August 1, 2006, Section 8.1(b)(2)(E) is deleted and new Sections 8.1(b)(2)(E) and (F) are added to read as follows:

> (E) payments for burial or funeral expenses for the Employee's deceased parent, spouse, children or dependents (as defined in section 152 of the Code without regarding to section 152(d)(1)(B) of the Code); or
>
> (F) expenses for the repair of damage to the Employee's principal residence that would qualify for the casualty deduction under section 165 of the Code (determined without regard to whether the loss exceeds 10% of adjusted gross income).

2. Effective August 1, 2006, the last sentences of Sections 4.1(a)(1) and 4.5(a)(1) are deleted.

3. Section 9.1(b)(3) is deleted for distributions with annuity starting dates after August 1, 2006, and Section 9.1(b)(4) is re-numbered as Section 9.1(b)(3).

IN WITNESS WHEREOF, Fifth Third Bank has caused this Amendment to be adopted this 17th day of July, 2006.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds

1672984.1

FOURTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), Appendix XXI of the Plan is hereby amended effective as of the date hereof in the following respects:

1. **Paragraph 1 is amended by placing the current text in a sub-paragraph with the heading "(a) Plan Merger."; and by adding a new sub-paragraph (b) to read as follows:**

(b) Investment, Recordkeeping and Administration Consolidation. In order to consolidate the investments, recordkeeping and administration in an orderly manner, the Administrator or its delegate shall establish a "Recordkeeping Combination Date" subsequent to the Merger Date. The Recordkeeping Combination Date shall be the date as of which the ongoing recordkeeping, administration and investments associated with the FNB Accounts are combined with the ongoing recordkeeping, administration and investments of the Plan as a whole, subject to the provisions of this Appendix.

In order to accomplish such consolidation, the Administrator or its delegate, shall have complete discretion and authority to impose a

blackout period during which affected Participants temporarily are unable to exercise such investment, withdrawal, distribution, loan and other rights under the Plan (including this Appendix) as may be determined by the Administrator or its delegate in it sole and absolute discretion.

2. **Paragraph 3 is amended in its entirety to read as follows:**

3. Investment of FNB Account.

(a) Participant Investment Rights. On and after the Recordkeeping Combination Date, a Participant shall have the same Participant-directed investment rights as provided in Section 7.1(c)(2) of the Plan over his FNB Account (including each of its subaccounts). In addition to the investment funds available under the Plan generally, the F.N.B. Corporation Stock Investment Option, as described and as restricted in (c) below, shall be one of the available investment options for the FNB Accounts. The Administrator or its delegate shall have complete discretion and authority in the transition (mapping) from the separate investment options available with respect to the FNB Accounts prior to the Recordkeeping Combination Date, to the investment funds available under the Plan generally.

(b) Fifth Third Stock Investment Option. As of the Recordkeeping Combination Date, the Fifth Third Stock Investment Option

shall become part of the Fifth Third Stock Fund (as defined in Section 7.4 of the Plan).

(c) F.N.B. Corporation Stock Investment Option.

(1) General. The F.N.B. Corporation Stock Investment Option shall consist of stock of F.N.B. Corporation or a fund invested primarily in such shares.

(2) Restrictions. No new investments (through investment transfers or otherwise) may be made into the F.N.B. Corporation Stock Investment Option. In accordance with rules or procedures established by the Administrator, a Participant may elect to transfer part or all of his FNB Account out of the F.N.B. Corporation Stock Investment Option and into other investment options available under the Plan. However, such amounts may not be transferred back into the F.N.B. Corporation Stock Investment Option.

(3) Voting of F.N.B. Corporation Stock. To the extent a Participant's FNB Account is invested in the F.N.B. Corporation Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to determine the manner in which the shares are to be voted at each annual or special meeting of the shareholders of F.N.B. Corporation and as to the manner in which any other right relating to such stock is to be exercised.

(4) Elimination of F.N.B. Corporation Stock Investment Option. Effective on a date determined by the Administrator or its delegate subsequent to the Recordkeeping Combination Date, the Trustee shall commence an orderly liquidation of the F.N.B. Corporation Stock. Net liquidation proceeds shall be allocated proportionately among the FNB Accounts based upon the number of shares of such stock held in such FNB Accounts as of the commencement of the liquidation such that each share of stock shall be considered to have been sold for the same net price. Upon completion of such liquidation, this investment option shall be eliminated and any FNB Accounts allocated to this investment option shall be re-allocated to such other investment fund under the Plan as the Administrator or its delegate, in its sole discretion, shall direct.

(d) Restoration of Surrender Charges. In the event that surrender charges are imposed in connection with the elimination of an investment option as of the Recordkeeping Combination Date that was previously available for the FNB Accounts, the Employer in its discretion, may restore the amount of such charges to the affected FNB Accounts. Such a contribution shall be subject to the limits of Article 5 and sections 401(a)(4) and 404 of the Code.

3. **Paragraph 6 is amended in its entirety to read as follows:**

6. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1 of the Plan), he may withdraw first from his FNB Rollover Account and then from his FNB 401(k) Account; provided however, the aggregate of any such withdrawals from his FNB 401(k) Account may not exceed the aggregate of his "Elective Deferral Contributions" under the FNB Plan.

- Hardship withdrawals after the Recordkeeping Combination Date shall be governed by Section 8.1 of the Plan. Such a withdrawal shall be made in a single sum consistent with Section 9.1(a) of the Plan.

4. **Paragraph 8 is amended in its entirety to read as follows:**

8. Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the FNB Plan prior to the Merger Date. A Participant may borrow from his FNB Account, excluding his FNB Additional Contribution Account. Any new loan made on or after the Recordkeeping Combination Date may be made solely from the Participant's FNB 401(k) Account and FNB Rollover Account. Loans shall be subject to Section 7.6 except as follows:

(a) Except for the maximum loan limit under Section 7.6(c), for loans made prior to the Recordkeeping Combination Date, the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from

his FNB Account and his loan privileges from the remainder of his Account. As such, for loans made prior to the Recordkeeping Combination Date, the minimum loan from a Participant's FNB Account hereunder is $1,000 and the minimum loan from other available accounts under Section 7.6 is $1,000. The limitations in Section 7.6 shall not apply separately for loans on and after the Recordkeeping Combination Date.

(b) A Participant may have up to two loans outstanding from his FNB Account and up to one loan outstanding from other available subaccounts under Section 7.6. No more than two loans from a Participant's FNB Account shall be approved in any 12-month period. Effective as of the Recordkeeping Combination Date, a new loan will not be made to a Participant with any other loans outstanding.

(c) In addition to the other applicable limits under Section 7.6(c), a loan from the Participant's FNB Account prior to the Recordkeeping Combination Date may not exceed 50 percent of his FNB Account, reduced by any outstanding loan balance on the date the new loan is made.

(d) The Administrator is authorized to administer the loan program as applied to the FNB Account and such administration prior to the Recordkeeping Combination Date may vary from the administration otherwise applicable to loans under Section 7.6.

5. **Paragraph 11(a) is amended in its entirety to read as follows; a new paragraph 11(b) is inserted to read as follows; and existing paragraphs 11(b) and (c) are re-lettered as (c) and (d) respectively:**

(a) Separate Administration Prior to Recordkeeping Combination Date. Prior to the Recordkeeping Combination Date, the Administrator shall administer distributions of the FNB Account separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his FNB Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $1,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4, 9.9 and 9.10 (regarding the required beginning date and minimum distributions). Subject to Sections 8.5(c) and 9.1(c) of the Plan, a Participant entitled to a distribution (excluding in-service withdrawals) commencing before the Recordkeeping Combination Date may elect to have his FNB Account paid in any of the forms described in (c) and (d) below.

(b) Combined Administration On and After Recordkeeping Combination Date. Distributions on and after the Recordkeeping Combination Date shall not be separately administered and shall be administered under Section 9.1(b) of the Plan. On and after the Recordkeeping Combination Date, only the optional forms of benefit specified under Section

9.1(b) shall be available (and the other optional forms specified in (c) and (d) below shall not be available).

6. **The heading of paragraph 11(c) (as re-lettered) is revised to read as follows, and the first clause of paragraph 11(c)(1) is revised to read as follows:**

(c) Qualified Joint and Survivor Annuity Prior to Recordkeeping Combination Date.

1. Automatic Form of Payment. The form of payment of a Participant's FNB Account before the Recordkeeping Combination Date shall be a Qualified Joint and Survivor Annuity (defined in (2) below) if:

7. **The heading of paragraph 11(d) (as re-lettered) is revised to read as follows, and the first clause of paragraph 11(d) is revised to read as follows:**

(d) Optional Forms of Benefit Prior to Recordkeeping Combination Date. In addition to the Qualified Joint and Survivor Annuity, a Participant may, by filing the proper form with the Administrator, elect to receive his vested FNB Account in any of the following forms for distributions prior to the Recordkeeping Combination Date:

8. **Paragraph 12(a) is amended in its entirety to read as follows:**

12. Preretirement Survivor Annuity Prior to Recordkeeping Combination Date.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity if:

(1) the Participant dies before the commencement of benefit payments;

(2) prior to his death, and before the Recordkeeping Combination Date, the Participant elects payment of his FNB Account in the form of a life annuity; and

(3) the Participant and such Surviving Spouse were married throughout the 1-year period ending on the date of the Participant's death or, if such Surviving Spouse is a former spouse treated as a Surviving Spouse pursuant to a qualified domestic relations order as described in section 414(p) of the Code, the Participant and such Surviving Spouse were married for at least 1 year.

9. **Paragraph 13 is amended in its entirety to read as follows:**

13. Balance of Death Benefit When Preretirement Survivor Annuity is Not Applicable.

(a) Prior to Recordkeeping Combination Date. Upon the death of a Participant prior to the Recordkeeping Combination Date and prior to the commencement of benefit payments from his

FNB Account, his Beneficiary shall be entitled to a benefit equal to his vested FNB Account if the Preretirement Survivor Annuity is not applicable because the Participant had not elected a life annuity, the Participant has no Surviving Spouse or if the Surviving Spouse dies before the Preretirement Survivor Annuity commences. Payment to the Beneficiary shall be in a single sum distribution or any annuity that is an optional form of benefit (except the full flexibility option shall not be available if the Beneficiary is not the spouse of the deceased Participant). The payment of a Participant's FNB Account upon his death before the Recordkeeping Combination Date shall be administered separately from the payment upon death of his other subaccounts under the Plan. A separate Beneficiary designation form shall be used for the FNB Account for a Participant who dies before August 22, 2006 and any such forms on file for the FNB Plan as of the Merger Date shall be controlling with respect to his FNB Accounts under this Plan through August 21, 2006 unless and until revoked or replaced in accordance with Plan procedures. The Beneficiary designation form used for the Plan subaccounts other than the FNB Accounts shall not be relevant as to the disposition of the FNB Accounts, in the case of a Participant's death before August 22, 2006 but shall be controlling in the case of a Participant's death on or after August 22, 2006.

(b) <u>On or After Recordkeeping Combination Date</u>. In the case of the death of a

Participant on or after the Recordkeeping Combination Date, the provisions in the Plan concerning the payment of a Participant's Account upon his death prior to the application of his Account for his benefit shall be controlling for the entire Account (including the FNB Account). This includes Article 10 and the definition of Beneficiary (Section 2.9). In such a case any separate Beneficiary designation form used for the FNB Account shall have no further force and effect on and after August 22, 2006. Any Beneficiary designation form used for the Plan subaccounts other than the FNB Accounts shall become controlling effective on August 22, 2006 for the FNB Account as well.

IN WITNESS WHEREOF, Fifth Third Bank has caused this Amendment to be adopted this 22nd day of August, 2006.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds

1722583.1

FIFTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended effective December 1, 2006 with respect to distributions on or after that date, as follows:

1. Section 6.1(f)(5)(A) is amended by replacing "$1,000" with "$5,000."

2. Section 8.5(c)(1) is amended by replacing "$1,000" with "$5,000 (excluding the value of a Participant's Rollover Account and other subaccounts specified in an Appendix attributable to rollover contributions)."

3. Section 8.5(e) is amended in its entirety, as follows:

> "Cash-Out Distributions. Any other provisions of the Plan to the contrary notwithstanding, any amount payable to a Participant under the Plan shall be paid in a single sum, provided that the value of the Participant's nonforfeitable benefit under the Plan (excluding the value of a Participant's Rollover Account and other subaccounts specified in an Appendix attributable to rollover contributions), determined as of the date of distribution, does not exceed $5,000, and such payment is made

before payment otherwise begins. Such single sum shall be paid as soon as administratively feasible after the amount otherwise becomes distributable under the Plan.

For distributions on or after December 1, 2006, in the event of such a mandatory distribution greater than $1,000, if the Participant does not elect to have such distribution paid directly to an eligible retirement plan specified by the Participant in a direct rollover or to receive the distribution directly in accordance with Section 9.8, then the Administrator will pay the distribution in a direct rollover to an individual retirement plan designated by the Administrator."

4. Section 9.1(c) is amended by replacing "$1,000" with "$5,000 (excluding the value of a Participant's Rollover Account and other subaccounts specified in an Appendix attributable to rollover contributions)."

IN WITNESS WHEREOF, the undersigned Chairman of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 27th day of October, 2006.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman, The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

1781452.1

SIXTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. **Interim Good Faith Amendments for Final 401(k) and (m) Regulations**. In order to satisfy the requirements of an interim good faith amendment required by the Final 401(k) and (m) Regulations, the Plan is hereby amended in the following respects effective January 1, 2006:

(a) **Elimination of Mandatory Disaggregation of ESOP in ACP Testing**. In order to reflect the elimination of the requirement of mandatory disaggregation of the ESOP portion of the Plan in connection with the actual contribution percentage testing, the Plan is amended in the following respects:

(i) **Section 2.3 is amended in its entirety to read as follows:**

2.3 (a) "Actual Contribution Percentage" for a group of Participants for a Plan Year is the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employer match contributed to the Plan for such Plan Year under Section 4.4 on behalf of each such Employee, plus the Employee's voluntary after-tax Participant contributions actually contributed under Section 4.5(a) during the Plan Year, to

(2) the Employee's Annual Compensation for such Plan Year.

(b) For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all plans described in section 401(a) of the Code or arrangements described in section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one such plan or arrangement and all matching contributions and employee contributions for any such Highly Compensated Employee under such arrangements for the Plan Year being tested shall be aggregated.

(c) If the Plan satisfies the requirements of section 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Contribution Percentages and for determining whether the nondiscrimination

rules of Section 4.6 are satisfied. If such aggregation applies, the other plans must use a testing method consistent with this Plan.

(ii) **Section 4.4(c) is deleted and Section 4.4(d) is re-lettered as 4.4(c). Section 4.5(b) is deleted. Section 4.6 is re-numbered as Section 4.11 and a new Section 4.6 is added to read as follows:**

4.6 Limitation on Employer Matching Contributions and Voluntary After-Tax Participant Contributions.

(a) Current Year Testing. Effective for Plan Years beginning after December 31, 2005, the Actual Contribution Percentage for any Plan Year for Participants who are Highly Compensated Employees shall not exceed the greater of:

(1) 1.25 times the Actual Contribution Percentage for the current Plan Year for Participants who are Non-highly Compensated Employees; or

(2) 2 times the Actual Contribution Percentage for the current Plan Year for Participants who are Non-highly Compensated Employees provided that the Actual Contribution Percentage for the Participants who are Highly Compensated Employees shall not exceed the Actual Contribution Percentage for the current Plan Year for Participants who are Non-highly Compensated Employees by more than 2 percentage points.

(b) Special Rules for Early Participation. If the Employer elects to apply the special rule of section 410(b)(4)(B) of the Code in determining that the Employer matching and voluntary after-tax contribution features satisfy the coverage rules of section 410(b)(1) of the Code, then the following special rules apply. In such a case, for testing purposes, the Plan shall be treated as two separate plans: one benefitting the Employees who have satisfied the lower minimum age and service conditions of the Plan but not the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan A"); and one benefitting Employees who have satisfied the greatest such conditions permitted under section 410(a) of the Code (hereinafter "Component Plan B"). The testing in this Section 4.6 shall be applied as follows:

(1) At the election of the Employer, for Plan Years beginning after December 31, 1998, the testing shall be applied separately to Component Plan A and Component Plan B. In this regard, the Actual Deferral Percentages and Actual Contribution Percentages shall be determined separately for each such Component Plan.

(2) For Plan Years beginning after December 31, 1998, at the election of the Employer, in lieu of the testing as provided in (A) above, the testing shall be applied solely to Component Plan B (and not Component Plan A); provided however any Highly Compensated

Employees in Component Plan A must be included in the Actual Deferral Percentage and testing of Component Plan B.

This provision shall be administered in accordance with rules and regulations promulgated by the Secretary of Treasury or its delegate.

(iii) **Section 4.7(d) is deleted and Section 4.7(c) is revised to read as follows:**

(c) Excess Actual Contribution Percentage.

(1) Excess Actual Contribution Percentage. If the Actual Contribution Percentage for a Plan Year for the Participants who are Highly Compensated Employees exceeds the maximum amount allowable under Section 4.6 (after application of (a) and (b) above), then the Administrator shall determine the amount to be distributed (or, if forfeitable, forfeited) ("Excess Aggregate Contributions") in accordance with the Code and applicable Treasury Regulations and the following. "Excess Aggregate Contributions" shall mean, with respect to any Plan Year, the excess of:

(A) The aggregate amount of contributions actually taken into account in computing the Actual Contribution Percentage of Highly Compensated Employees for such Plan Year, over

(B) The maximum amount of such contributions permitted by the Actual

Contribution Percentage test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of the ratios calculated separately for each such Participant (under Section 2.3) beginning with the highest of such percentages).

(2) Required Distributees and Forfeitures. Excess Aggregate Contributions are allocated to the Highly Compensated Employees with the largest amounts of contributions taken into account in calculating the Actual Contribution Percentage test for the year in which the excess arose, beginning with the Highly Compensated Employee with the largest amount of such contributions and continuing in descending order until all the Excess Aggregate Contributions have been allocated. For purposes of the preceding sentence, the "largest amount" is determined after distribution (or forfeiture) of any Excess Aggregate Contributions.

(3) Distribution and Forfeiture. The Administrator shall distribute to (or forfeit from in the case of a forfeitable amount) each Highly Compensated Employee specified in (2) above from his Account the sum (or difference) of:

(A) the amount (if any) determined under (2) above; plus (or minus)

(B) the income (or loss) allocable to the amount determined under (A) determined by the Administrator in accordance with Treasury Regulations under any reasonable

method used consistently for all Participants and for all corrective distributions under the Plan for the Plan Year.

Any other provisions of the Plan to the contrary notwithstanding, the Administrator shall distribute (or forfeit, as applicable) the amount so determined as a lump sum no later than the last day of the following Plan Year; provided, however, the Employer shall be subject to a 10% excise tax under section 4979 of the Code if the distributions (or forfeitures) are not made before the close of the first 2½ months of such following Plan Year. Any forfeitures in this Section 4.7(c) may not be allocated to Participants who receive a distribution or incur a forfeiture under this Section 4.7.

(4) Allocation of Excess. The amount determined above shall be distributed from the Participant's After-Tax Account to the extent of the contributions thereto for the Plan Year that were not matched plus the income allocable to such contributions. Any remaining amount shall be distributed (or, in the case of the Employer Matching Account, distributed or forfeited based on the Participant's vested percentage) first from the Participant's After-Tax Account and then, the Participant's Employer Matching Account plus the income allocable to such contributions.

(5) Effect on Other Provisions. If distributions are made in accordance with this Section 4.7 with respect to a Plan Year, then the limitations of Section 4.6 shall be deemed

satisfied for the Plan Year. Except to the extent provided by the Secretary of the Treasury, distributions hereunder shall be taken into account under Article 5.

(iv) **Corresponding Changes.**

(A) Section 2.4(b) is amended by deleting the clause "provided however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other portions of the Plan" and by changing the semi-colon to a period.

(B) The cross-references to "Section 4.6" in Appendix XVII, paragraph 3; Appendix XVIII, paragraph 1(d); and Appendix XIX, paragraph 2(b)(i), shall be changed to "Section 4.11."

(C) The cross-reference to "4.5(b)" in Section 4.7(a)(4) shall be changed to "4.6."

(b) **Elimination of Targeted QNECs.** In order to reflect the elimination of targeted QNECs in ADP and ACP testing, the Plan is hereby amended in the following respects:

(i) Section 4.3 is amended by deleting Section 4.3(b) and by relettering subsections (c) and (d) as (b) and (c) respectively. The cross-references in Section 4.3(a) to "(c) or (d) below" shall be changed to "(b) or (c) below." The reference in Section 4.3(b) (as re-lettered) to "this Section 4.3(c)" shall change to "this Section 4.3(b)." The cross-references to "Section 4.3(d)" in Section 4.4 and Section 4.7(a)(2) shall change to "Section

4.3(c)." The cross-references to "Section 4.3(c)" in Section 4.7(a)(4), Section 4.7(b)(1) and (3) and Section 2.4(c), shall change to "Section 4.3(b)."

(ii) Section 4.5(a)(2) is deleted. The text of existing paragraph (1) of Section 4.5(a) is retained but the headings "General" and "Participant Contributions" are deleted. The reference to "(b) below" in Section 4.5 shall change to "Section 4.6."

(iii) Section 2.4(a)(1) is amended by deleting the clause "plus any amounts contributed on behalf of each such Employee for the Plan Year under Section 4.3(b)."

(iv) Section 2.43 is amended by changing "Sections 4.1 and 4.3(b)" to "Section 4.1."

(c) **Other Changes for 401(k) and (m) Regulations.**

(i) Section 2.4(c) is amended by adding the following sentence to the end thereof: "If such aggregation applies, the other plans must use a testing method consistent with this Plan."

(ii) Section 2.4(b) is amended by adding the following to the end of the sentence:

"and all elective contributions for any such Highly Compensated Employees under such arrangements for the Plan Year being tested shall be aggregated."

(iii) Section 8.6 is amended by deleting subsections (e) and (f) and by re-lettering subsection (g) as (e). The last sentence of Section

8.6 is amended by deleting the reference to "(e) or (f)."

(iv) Section 8.1 (b)(3)(D) is amended by adding "(including distribution of ESOP dividends under section 404(k) of the Code)" immediately after the word "distributions."

(v) Section 8.1(b)(2)(A) is amended in its entirety to read as follows:

"expenses for (or necessary to obtain) medical care that would be deductible under section 213(d) of the Code (determined without regard to whether the expenses exceed 7.5% of adjusted gross income);"

(vi) Section 8.1(b)(2)(C) is amended in its entirety to read as follows:

"payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the Employee, or the Employee's spouse, children, or dependents (as defined in section 152 of the Code, without regard to Code section 152(b)(1), (b)(2) and (d)(1)(B))."

(vii) Section 8.6(d) is amended by changing the text within the parenthetical to read as follows:

"(other than an employee stock ownership plan as defined in section 4975(e)(7) or 409(a) of the Code, a simplified employee pension as defined in section 408(k) of the Code, a SIMPLE IRA plan as defined in section 408(p) of the Code, a plan or contract that

satisfies the requirements of section 403(b) of the Code, or a plan that is described in section 457(b) of the Code.)"

(viii) Section 14.5 is amended by adding the following sentence thereto:

"In the case of a transfer to another plan of any Frozen Cash Election Account, Section 401(k) Salary Deferral Account or any other portion of an Account subject to the 401(k) restrictions on distributions, such a transfer may take place only if it is reasonably concluded that the transferee plan contains the restrictions described in Section 8.6."

2. **Clarification of In-Kind Distributions.** Section 9.1(b) is amended as of the date hereof by adding the following to the end thereof:

"Notwithstanding any provision to the contrary in an Appendix, periodic installments shall be in cash, and a Participant may exercise any right provided in an Appendix to an in-kind distribution only if he elects a single sum distribution."

IN WITNESS WHEREOF, the undersigned Chairman of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 27th day of November, 2006.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman, The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

1800800.1

SEVENTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective as of December 31, 2000) (the "Plan"), the Plan is hereby amended effective November 2, 2007 in the following respects:

1. A new Appendix XXIII is added to the Plan in the form attached hereto, and the W. Lyman Case & Company 401(k) Profit Sharing Plan is merged into the Plan.

2. Appendix I is amended by amending the following line item in the chart as follows:

W. Lyman Case & Company	II and XXIII	XXIII

IN WITNESS WHEREOF, the undersigned Chairman of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee has caused this Amendment to be adopted as of this 18 day of October, 2007.

FIFTH THIRD BANK

BY: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman
Fifth Third Bank Pension, Profit
Sharing and Medical Plan Committee

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XXIII

W. LYMAN CASE & COMPANY 401(K) PROFIT SHARING PLAN

1. Merger of W. Lyman Case & Company 401(k) Profit Sharing Plan. Effective as of November 2, 2007 (the "Merger Date"), the W. Lyman Case & Company 401(k) Profit Sharing Plan (the "WLC Plan") is merged into this Plan. Upon the merger, an individual who is not already a Participant (or Beneficiary) but who had an account in the WLC Plan on the Merger Date, shall become a Participant (or Beneficiary). The WLC Plan is a Predecessor Plan such that service taken into account under the WLC Plan shall count as Service under Section 2.44 of this Plan; provided, however, there shall be no duplication of Service under the Plan for the same period of time.

The provisions set forth below shall be effective from and after the Merger Date.

2. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the WLC Plan shall be separately accounted for under the Plan. A Participant shall have a WLC Account which, as of the Merger Date, shall be equal to his accounts under the WLC Plan as of such date. A Participant's WLC Account shall be adjusted in accordance with Section 7.2 and shall not share in any contributions or forfeitures allocated under the Plan. There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of

the Plan) such of the following subaccounts of his WLC Account as are necessary in order to separately account for the merger of the WLC Plan into the Plan:

(a) a "WLC 401(k) Account," which is attributable to a Participant's "elective deferrals" under the WLC Plan, as adjusted in accordance with Section 7.2.

(b) a "WLC Employer Matching Account," which is attributable to "matching contributions" under the WLC Plan, as adjusted in accordance with Section 7.2.

(c) a "WLC Rollover Account," which is attributable to a Participant's "rollover contributions" under the WLC Plan, as adjusted in accordance with Section 7.2.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. While the WLC Plan allowed for the possibility of "profit sharing contributions" and "QNECs," no such contributions were held under the WLC Plan as of the Merger Date so no subaccounts are necessary under this Plan to account for such types of contribution.

3. Investment of WLC Account. A Participant shall have the Participant-directed investment rights provided in Section 7.1(c)(2) of the Plan over his entire WLC Account (including subaccounts).

4. Vesting. A Participant's rights to his WLC Account (including subaccounts) shall be nonforfeitable at all times.

5. Hardship Withdrawals. In the event a Participant incurs a hardship (as defined in Section 8.1 of the Plan), the Participant may make withdrawals from his WLC 401(k) Account; provided, however, the aggregate of such withdrawals shall not exceed the aggregate of the Participant's own section 401(k) contributions (excluding earnings) credited to such WLC 401(k) Account.

6. In-Service Withdrawals After Age 59½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his WLC Account if he has reached age 59½. Such a withdrawal shall be made in a single sum. A Participant may make withdrawals under this Section only once per Plan Year.

EIGHTEENTH AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Effective November 2, 2007, the Plan is amended to add Appendix XXIV which reads as attached hereto.

2. Appendix I is amended effective November 2, 2007, by adding the following line item in the chart immediately following the Peoples Bank Corporation of Indianapolis (and subsidiaries) line item:

R-G Crown Bank, FSB	XXIV	XXIV

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted as of this 8th day of November, 2007.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

2243257.1

THE FIFTH THIRD BANCORP
MASTER PROFIT SHARING PLAN

APPENDIX XXIV

R-G CROWN BANK, FSB

1. Crown Employee. For purposes of this Appendix, "Crown Employee" means an individual who, immediately prior to the acquisition of stock of R-G Crown Bank, FSB on November 2, 2007, pursuant to the Stock Purchase Agreement dated May 20, 2007, among Fifth Third Financial Corporation, R-G Crown Bank, FSB, R&G Financial Corporation, and R&G Acquisition Holdings Corporation, was employed by R-G Crown Bank, FSB as an employee and became an "Employee" in connection with such acquisition.

2. Eligibility.

(a) For 401(k) Contributions and Matching Contributions. A Crown Employee with at least 30 days of Eligibility Service shall be eligible to make 401(k) contributions under Section 4.1 and to receive matching contributions (as described in 5 below) commencing with the November 15, 2007 pay date. A Crown Employee with less than 30 days of Eligibility Service prior to November 15, 2007 shall be eligible to make 401(k) Contributions under Section 4.1 and to receive matching contributions only on and after the first pay date following his completion of 30 days of Eligibility Service.

(b) Ineligibility For Performance Reward Contributions and After-Tax Contributions for 2007. Notwithstanding anything to the contrary in the Plan, a Crown Employee shall not be eligible to receive

Performance Reward Contributions under Section 4.9 for the 2007 Plan Year and shall not be eligible to make after-tax contributions under Section 4.5 in 2007.

(c) Rollover Contributions. Each Crown Employee shall be eligible immediately to make rollover contributions under Section 4.11 of the Plan.

3. Past Service Credit. Effective November 2, 2007, each Crown Employee shall be credited with Service under Section 2.44(a)(5) of the Plan for his service with R-G Crown Bank, FSB. Such service shall be determined under rules comparable to those under Section 2.44(a)(1), (2) and (3). Such Service shall be taken into account in determining Eligibility Service and Vesting Service.

4. Deferrable Compensation. For Crown Employees for the 2007 Plan Year, the definition of Deferrable Compensation in Section 2.12 of the Plan shall not apply. Instead, Deferrable Compensation shall mean wages as defined in Code Section 3401(a) and all other payments of compensation to an Employee by the Employer (in the course of the Employer's trade or business) for services to the Employer while employed as an Employee for which the Employer is required to furnish the Employee a written statement under Code Sections 6041(d) and 6051(a)(3). Deferrable Compensation must be determined without regard to any rules under Code Section 3401(a) that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in Code Section 3401(a)(2)).

Deferrable Compensation shall generally be based on the amount actually paid, or would have been paid but for a Section 401(k) compensation reduction election under the Plan, to the Employee during that portion of the Plan Year that the Employee is a Participant.

The compensation limit under section 401(a)(17) of the Code, as set forth in Section 2.12 of the Plan, shall apply.

Deferrable Compensation shall not include reimbursements or other expense allowances, fringe benefits (cash and non-cash), moving expenses, deferred compensation, and welfare benefits, but shall include amounts that are not includable in the gross income of the Participant under a salary reduction agreement by reason of the application of section 125, 132(f)(4), 402(e)(3), 402(h), 403(b), or 457(b) of the Code.

5. Employer Matching Contributions. For Crown Employees, for the 2007 Plan Year, the rate of Employer matching contribution specified in Section 4.4(a) shall not apply. Instead, the amount of such matching contributions for Crown Employees for 2007 commencing with the November 15, 2007 pay date, shall equal one hundred percent (100%) of so much of the Participant's compensation reduction contributions for such pay period as do not exceed six percent (6%) of the Participant's Deferrable Compensation otherwise payable for such pay period. Notwithstanding Section 4.1(a)(2), for Crown Employees, for the 2007 Plan Year,

catch-up contributions shall be eligible for such matching contributions.

2243257.1

NINETEENTH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended, effective as of the "Effective Time" as defined in the Amended and Restated Agreement and Plan of Merger by and among First Charter Corporation, Fifth Third Bancorp and Fifth Third Financial Corporation dated as of September 14, 2007, by adding a new Appendix XXV to the Plan to read as attached hereto.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 30th day of May, 2008.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN APPENDIX XXV

FIRST CHARTER CORPORATION AND SUBSIDIARIES

1. Definitions.

(a) First Charter Employee. For purposes of this Appendix, "First Charter Employee" means an individual who, immediately prior to the Effective Time, was an "Eligible Employee" as defined in the First Charter Corporation Retirement Savings Plan

(b) First Charter Subsidiary. For purposes of this Appendix, "First Charter Subsidiary" means First Charter Corporation or a corporation which, immediately prior to the Effective Time, was a subsidiary (direct or indirect) of First Charter Corporation, as well as the surviving corporation of any merger or consolidation of such an entity with one or more subsidiaries (direct or indirect) of Fifth Third Bancorp. A corporation shall be considered a "First Charter Subsidiary" only while a subsidiary (direct or indirect) of Fifth Third Bancorp.

(c) Effective Time. For purposes of this Appendix, "Effective Time" shall have the same meaning provided that term in the Amended and Restated Agreement and Plan of Merger by and among First Charter Corporation, Fifth Third Bancorp and Fifth Third Financial Corporation dated as of September 14, 2007.

2. Eligibility.

(a) Exclusion of First Charter Employees. Anything in the Plan to the contrary notwithstanding, in no event shall a First Charter Employee be considered an "Employee" or a "Participant" under the Plan. As such, in no event, shall a First Charter Employee be eligible to make contributions of any type under the Plan or to receive allocations of contributions of any type under the Plan.

In the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee. If he then, or upon re-hire, otherwise meets the Plan's definition of "Employee" in Section 2.19 of the Plan, he shall no longer be excluded from eligibility by reason of this paragraph 2(a).

(b) Eligibility of New, Re-hired and Transferred Employees of First Charter Subsidiaries.

(i) Eligible Employers. For purposes of making certain individuals eligible "Employees" under the Plan, each First Charter Subsidiary shall be considered an Employer under the Plan. However, for purposes of eligibility under the Plan, only the individuals meeting the requirements of (ii) below shall be considered eligible Employees of a First Charter Subsidiary.

(ii) Eligible Employees. The following categories of individuals shall be considered eligible "Employees" under the Plan:

(A) an individual who is otherwise an eligible "Employee" (i.e. he meets the definition in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan) of a First Charter Subsidiary and who is not a First Charter Employee because his Employment Commencement Date is on or after the Effective Time;

(B) an Employee of an Employer (other than a First Charter Subsidiary) whose employment is transferred to a First Charter Subsidiary (provided the individual continues to meet the definition of "Employee" in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan);

(C) an individual who was previously employed by a First Charter Subsidiary, who terminated employment with the First Charter Subsidiary and who is re-hired by a First Charter Subsidiary as an Employee (as otherwise defined in Section 2.19 of the Plan who is not ineligible under Section 3.4 of the Plan) on or after the Effective Time; and

(D) in the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee, and he shall at that time be considered an eligible Employee under the Plan provided he otherwise meets the Plan's definition of "Employee" in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan.

TWENTIETH AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Effective July 10, 2008, Appendix XXV is completely amended and restated in the form attached hereto, and the First Charter Corporation Retirement Savings Plan is merged into the Plan.

2. Appendix I is amended by adding the following line items in the chart immediately following the Falls Savings Bank, FSB line item, the first of which is effective July 10, 2008, and the second of which is effective May 3, 2008.

First Charter Corporation (and subsidiaries)	XXV	XXV
First Horizon National Corporation (and First Tennessee Bank National Association)	II	

3. Effective May 3, 2008, Appendix II is amended by adding a new subsection (xix) to Section 1 to read as follows:

(xix) First Horizon National Corporation. Former employees of First Horizon National

Corporation (or First Tennessee Bank National Association) (together "First Horizon"), who became Employees on or before May 3, 2008 in connection with Fifth Third Financial Corporation's (and Fifth Third Bank's) acquisition of certain assets of First Horizon, shall be credited with Service under Section 2.44 of the Plan for their service with First Horizon.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 10th day of July, 2008.

FIFTH THIRD BANK

By: /s/Paul L. Reynolds
Paul L. Reynolds, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN
APPENDIX XXV

FIRST CHARTER CORPORATION AND SUBSIDIARIES

1. Eligibility.

(a) Definitions.

(i) First Charter Employee. For purposes of this Appendix, "First Charter Employee" means an individual who, immediately prior to the Effective Time, was an "Eligible Employee" as defined in the First Charter Corporation Retirement Savings Plan

(ii) First Charter Subsidiary. For purposes of this Appendix, "First Charter Subsidiary" means First Charter Corporation or a corporation which, immediately prior to the Effective Time, was a subsidiary (direct or indirect) of First Charter Corporation, as well as the surviving corporation of any merger or consolidation of such an entity with one or more subsidiaries (direct or indirect) of Fifth Third Bancorp. A corporation shall be considered a "First Charter Subsidiary" only while a subsidiary (direct or indirect) of Fifth Third Bancorp.

(iii) Effective Time. For purposes of this Appendix, "Effective Time" shall have the same meaning provided that term in the Amended and Restated Agreement and Plan of Merger by and among First Charter Corporation, Fifth Third Bancorp and Fifth Third Financial Corporation dated as of September 14, 2007.

(b) Exclusion of First Charter Employees Prior to Merger Date. Anything in the Plan to the contrary notwithstanding, in no event shall a First Charter Employee be considered an "Employee" or a "Participant" under the Plan prior to the Merger Date (as defined below). As such, prior to the Merger Date, in no event, shall a First Charter Employee be eligible to make contributions of any type under the Plan or to receive allocations of contributions of any type under the Plan.

In the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee. If he then, or upon re-hire, otherwise meets the Plan's definition of "Employee" in Section 2.19 of the Plan, he shall no longer be excluded from eligibility by reason of this paragraph 1(b).

(c) Eligibility of New, Re-hired and Transferred Employees of First Charter Subsidiaries Prior to Merger Date.

(i) Eligible Employers. For purposes of making certain individuals eligible "Employees" under the Plan, each First Charter Subsidiary shall be considered an Employer under the Plan. However, for purposes of eligibility under the Plan prior to the Merger Date, only the individuals meeting the requirements of (ii) below shall be considered eligible Employees of a First Charter Subsidiary.

(ii) Eligible Employees Prior to Merger Date. The following categories of individuals shall be

considered eligible "Employees" under the Plan prior to the Merger Date:

(A) an individual who is otherwise an eligible "Employee" (i.e. he meets the definition in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan) of a First Charter Subsidiary and who is not a First Charter Employee because his Employment Commencement Date is on or after the Effective Time;

(B) an Employee of an Employer (other than a First Charter Subsidiary) whose employment is transferred to a First Charter Subsidiary (provided the individual continues to meet the definition of "Employee" in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan);

(C) an individual who was previously employed by a First Charter Subsidiary, who terminated employment with the First Charter Subsidiary and who is re-hired by a First Charter Subsidiary as an Employee (as otherwise defined in Section 2.19 of the Plan who is not ineligible under Section 3.4 of the Plan) on or after the Effective Time; and

(D) in the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee, and he shall at that time be considered an eligible Employee under the Plan provided he otherwise meets the Plan's definition of "Employee" in

Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan.

(d) Eligibility upon Merger of First Charter Corporation Retirement Savings Plan. Effective upon the merger of the First Charter Corporation Retirement Savings Plan into this Plan, each First Charter Employee who otherwise meets the definition of "Employee" under this Plan shall be considered an Employee and Participant in this Plan, as provided in Section 3.1(a) (provided he is not ineligible under Section 3.4). As provided in Section 3.1(b), each such Employee shall be eligible to make 401(k) contributions, to receive matching contributions and to make after-tax contributions on and after the first pay date (following the Merger Date) following his completion of 30 days of Eligibility Service (counting service with First Charter Corporation as provided in paragraph 2(b)(ii) below).

2. Merger of First Charter Corporation Retirement Savings Plan.

(a) Merger. Effective as of July 10, 2008 (the "Merger Date"), the First Charter Corporation Retirement Savings Plan (the "First Charter Plan") is completely amended and restated and merged into this Plan. This Plan represents a continuation of the First Charter Plan, and contributions shall continue as provided in this Plan. Upon the merger, an individual who is not already a Participant (or Beneficiary) but who had an account in the First Charter Plan on the Merger Date, shall become a Participant (or Beneficiary).

(b) Predecessor Plan and Crediting of Past Service. The First Charter Plan is a Predecessor Plan. Past service shall be credited as provided in (i) below for purposes of determining a Participant's nonforfeitable percentage under the Plan of those subaccounts subject to a vesting schedule. Past service shall be credited as provided in (ii) below for purposes of determining a Participant's eligibility under Section 3.1(b) of the Plan (and paragraph 1(d) above).

(i) Crediting of Past Service for Vesting Purposes. For purposes of determining a Participant's Vesting Years, Service shall be determined under Section 2.44(a)(4) with respect to the First Charter Plan. As such, Service under such Predecessor Plan shall be treated as Service under this Plan based on such Predecessor Plan's hour counting methodology through that Predecessor Plan's computation period ending December 31, 2007. Thereafter, the transition rule in Section 2.44(a)(4)(B) shall apply, and Service shall be credited under this Plan's elapsed time method. In no event shall there be any duplication of Service for the same period.

(ii) Crediting of Past Service for Eligibility. For purposes of determining a Participant's "Eligibility Service" for eligibility under Section 3.1(b) and paragraph 1(d) above, to make 401(k) contributions, to receive matching contributions and to make after-tax contributions, Section 2.44(a)(4) shall be disregarded. Instead, a Participant's past service with First Charter Corporation or any subsidiary of First Charter Corporation, as well as service with any such entity after it became an Affiliate, shall be taken into account under the elapsed time method under rules

comparable to the rules in Section 2.44(a)(1), (2) and (3) of the Plan. In all events there shall be no duplication of service for the same period.

The Administrator shall have the sole power and authority to determine Service under the foregoing.

(c) Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the First Charter Plan shall be separately accounted for under the Plan. A Participant shall have a First Charter Account which, as of the Merger Date, shall be equal to his accounts under the First Charter Plan as of such date. A Participant's First Charter Account shall be adjusted in accordance with Section 7.2 and shall not share in any contributions or forfeitures allocated under the Plan (ongoing contributions under the Plan instead are reflected in the subaccounts referred to in Article 4 of the Plan). There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his First Charter Account as are necessary in order to separately account for the merger of the First Charter Plan into the Plan:

(i) a "First Charter 401(k) Account," which is attributable to a Participant's "Deferral Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(ii) a "First Charter After-Tax Account," which is attributable to a Participant's "Extra Savings Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(iii) a "First Charter Discretionary Contribution Account," which is attributable to a Participant's "Company Discretionary Contribution Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(iv) a "First Charter Matching Account," which is attributable to a Participant's "Match Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(v) a "First Charter Money Purchase Account," which is attributable to a Participant's "Money Purchase Subaccount" and "Safe Harbor Nonelective Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(vi) a "First Charter Qualified Nonelective Account," which is attributable to a Participant's "Bank Savings Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(vii) a "First Charter Rollover Account," which is attributable to a Participant's "Rollover Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's First Charter 401(k) Account and First Charter Qualified Nonelective Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

(d) Investment of First Charter Account.

(i) General. A Participant shall have Participant-directed investment rights over his entire First Charter Account (including each of its subaccounts) comparable to the Participant-directed investment rights described in Section 7.1(c)(2). Such Participant-directed investment rights applicable to a Participant's First Charter Account shall be administered separately from such comparable investment rights as are applicable to other subaccounts under the Plan. The Administrator shall direct the Trustee as to the investment funds to be made available for the First Charter Accounts, which, initially shall be the same investment funds as are available under the First Charter Plan as of the Merger Date. Such investment funds need not be the same as the investment funds made available for the investment of other subaccounts under the Plan. In all events, the Fifth Third Stock Investment Option, as described in (ii) below, shall be one of the available investment options.

(ii) Fifth Third Stock Investment Option. The Fifth Third Stock Investment Option shall consist of common stock of Fifth Third Bancorp or a fund invested primarily in such shares.

(iii) Voting of Employer Securities. To the extent a Participant's First Charter Account is invested under the Fifth Third Stock Investment Option, the Participant (or in the event of his death, his Beneficiary) shall have the right to determine the manner in which his shares (or the shares represented by his interest in any such fund) are to be voted at each annual or special meeting of the shareholders of Fifth

Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(iv) ESOP Designation. The Fifth Third Stock Investment Option shall be part of the Plan's stock bonus plan feature and employee stock ownership plan (as defined in section 4975(e)(7) of the Code) feature.

(v) ESOP Dividend Pass-Through Election. With respect to dividends payable on the common stock of Fifth Third Bancorp credited to the vested portion of a Participant's First Charter Account (including any subaccount of a First Charter Account), the Participant (or in the event of his death, his Beneficiary) shall have the right to elect, in accordance with instructions or procedures of the Administrator, or its delegate, to either (1) leave such dividends in the Plan for reinvestment in common stock of Fifth Third Bancorp under the Fifth Third Stock Investment Option or otherwise, or (2) take the dividends in cash.

(e) Vesting.

(i) Fully Vested Accounts. A Participant's rights to his First Charter 401(k) Account, First Charter After-Tax Account, First Charter Rollover Account, First Charter Money Purchase Account and First Charter Qualified Nonelective Account shall be nonforfeitable at all times.

(ii) Vesting Schedule. A Participant shall have a nonforfeitable right to a percentage of his First Charter Matching Account and his First Charter Discretionary Contribution Account on the basis of the number of his Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 2	0%
2	25%
3	50%
4	75%
5 or more	100%

Upon and after a Participant's attainment of age 65, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his First Charter Matching Account and his First Charter Discretionary Contribution Account. In addition, the provisions of Section 6.1(f)(2)(B) and (C), (3), (4), (5) and (7) shall apply to a Participant's First Charter Matching Account his First Charter Discretionary Contribution Account.

(iii) Other Vesting Provisions. Notwithstanding paragraph (ii) above, a Participant shall be fully vested in his entire First Charter Account provided the Administrator determines in its sole and absolute discretion that the Participant has been identified in writing by Fifth Third Bancorp (or any of its subsidiaries) for severance under Fifth Third Bancorp's severance policy in connection with the merger of First Charter Corporation into Fifth Third Financial Corporation (whether or not such Participant

continues employment until his actual release date and actually receives severance pay).

(f) Hardship Withdrawals. In the event of a Participant's incurrence of a hardship, he may make withdrawals while he is an Employee, first from his First Charter After-Tax Account and the nonforfeitable portion of his First Charter Matching Account, and then from his First Charter 401(k) Account; provided however, the aggregate of any such withdrawals from his First Charter 401(k) Account may not exceed the aggregate of his "Deferral Contributions" under the First Charter Plan. Such a withdrawal shall be made in a single sum. For purposes hereof, "hardship" means an immediate and heavy financial need of an Employee, which consists of one of the circumstances described in Sections 8.1(b)(2)(A) through (F) of the Plan or expenses for medical care for a non-custodial child. A withdrawal based on financial hardship cannot exceed the amount required to satisfy that need (including taxes and penalties on the withdrawal).

In order to meet this requirement, the Administrator may require the Participant to provide the representation referred to in Section 8.1(b)(3) of the Plan and/or require the Participant to meet the following limitations and restrictions:

(i) the Employee has obtained all withdrawals and distributions (other than hardship withdrawals) and all nontaxable loans currently available under all plans maintained by the Employer;

(ii) the Participant shall be suspended from making section 401(k) compensation reduction

contributions and voluntary after-tax participant contributions for a period of at least 6 months;

(iii) dividends payable on common stock of Fifth Third Bancorp which are eligible for a pass-through election under paragraph 2(d)(v) above or Section 7.4(d) of the Plan shall automatically be distributed to the Participant in cash from the Plan not later than ninety (90) days after the close of the Plan Year in which such dividends are paid to the Plan. The automatic distribution of such dividends shall be effective applicable to dividends payable during the period beginning on the date the Participant receives the withdrawal and ending on the date that is six (6) months after the date the Participant receives the withdrawal.

(g) In-Service Withdrawals After Age 59½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter Account, excluding his First Charter Money Purchase Account, if he has reached age 59½. Such a withdrawal shall be made in a single sum.

(h) First Charter After-Tax Account Withdrawal. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter After-Tax Account, no more than once per Plan Year. Such a withdrawal shall be made in a single sum.

(i) Withdrawals from First Charter Rollover Account. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter Rollover

Account, no more than once per Plan Year. Such a withdrawal shall be made in a single sum.

(j) Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the First Charter Plan prior to the Merger Date. A Participant may borrow from his First Charter Account. Loans shall be subject to Section 7.6 except as follows:

(i) Except for the maximum loan limit under Section 7.6(c), the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from his First Charter Account and his loan privileges from the remainder of his Account. As such, the minimum loan from a Participant's First Charter Account hereunder is $1,000 and the minimum loan from other available Accounts under Section 7.6 is $1,000.

(ii) A Participant may have up to one loan outstanding from his First Charter Account and up to one loan outstanding from other available subaccounts under Section 7.6.

(iii) A loan from the Participant's First Charter Account used to purchase the Participant's primary residence may be for a term up to fifteen years, but not extending beyond the date the Participant would attain age 65.

(iv) The Administrator is authorized to administer the loan program as applied to the First Charter Account and such administration may vary from the administration otherwise applicable to loans under Section 7.6.

(k) Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's First Charter Account is invested in the common stock of Fifth Third Bancorp (or a fund consisting primarily of the common stock of Fifth Third Bancorp), the Participant may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his First Charter Account (but not in any in-service withdrawal).

(l) Forms of Payment/Administration of Distributions.

(i) Separate Administration. The Administrator shall administer distributions of the First Charter Account separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his First Charter Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $5,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4 and 9.10 (regarding the required beginning date and minimum distributions).

(ii) Qualified Joint and Survivor Annuity.

(A) Automatic Form of Payment. The form of payment of a Participant's First Charter Money Purchase Account shall be a Qualified Joint and Survivor Annuity (defined in (B) below) unless the Participant has waived such Annuity pursuant to (C) below.

(B) Definition of Qualified Joint and Survivor Annuity.

(1) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in Section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse.

(2) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(3) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable First Charter Money Purchase Account balance.

(C) Waiver.

(1) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 180-day election period ending on the date as of which his benefit payments are to begin. Such waiver must be in writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(2) Revocation. A Participant may also revoke any waiver under (A) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(3) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 180 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(a) the terms and conditions of the Qualified Joint and Survivor Annuity and the qualified optional survivor annuity,

(b) the Participant's right to make, and the effect of, an election under (1) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(c) the rights of the Participant's spouse under (D) below,

(d) the right to make, and the effect of, a revocation of an election under (2) above, and

(e) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the

30-day limit and/or to provide such written explanation after the annuity starting date.

(D) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(1) such spouse consents in writing to such election, and such spouse's consent:

(a) acknowledges the effect of such election,

(b) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(c) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(d) is witnessed by a Plan representative or a notary public; or

(2) it is established to the satisfaction of a Plan representative that the consent required under (1) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may

be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (1)(b) and (c) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(iii) Optional Forms of Benefit. Subject to an effective waiver of the Qualified Joint and Survivor Annuity, a Participant may, by filing the proper form with the Administrator, elect to receive his vested First Charter Money Purchase Account in one of the following forms:

(A) a single sum,

(B) periodic payments, to be paid monthly, quarterly, semiannually or annually, in substantially equal amounts for a specified number of years (subject to Sections 9.4, 9.9 and 9.10); or

(C) a qualified optional survivor annuity. Under a qualified optional survivor annuity, a married Participant is entitled to an immediate annuity which provides a lifetime benefit for the Participant and a lifetime benefit for his Surviving Spouse equal to 75% of the benefit payable to the Participant during their joint lives.

(m) Preretirement Survivor Annuity for First Charter Money Purchase Account.

(i) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement

Survivor Annuity from the Participant's vested First Charter Money Purchase Account if:

(A) the Participant dies before the commencement of benefit payments; and

(B) the Participant has not elected under (iii) below to waive the Preretirement Survivor Annuity.

(ii) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse in the amount of benefit that can be purchased with 100 percent of the Participant's nonforfeitable First Charter Money Purchase Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70½) elected by such Surviving Spouse.

(iii) Waiver of Preretirement Survivor Annuity.

(A) General. A Participant to whom (m)(i) above applies may waive coverage of the Preretirement Survivor Annuity at any time during his election period under (C) below. Such a waiver must be in writing aud must specify the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. Any waiver under (A) above may be revoked at any time during the Participant's election period under (C) below. There

shall be no limitation on the number of such waivers and revocations permitted during such election period.

(C) Election Period. For purposes of (A) and (B) above, the election period shall be the period

(1) beginning on the earlier of

(a) the first day of the Plan Year in which the Participant attains age 35, or

(b) the date of the Participant's separation from service; provided however, if the Participant returns to service, then any election made prior to the first day of the Plan Year in which he attains age 35 shall be voided; and

(2) ending on the Participant's date of death.

(D) Written Explanation.

(1) The Administrator shall provide to each Participant, within the "Applicable Period," as defined below, and consistent with such regulations as the Secretary of the Treasury may prescribe, a written explanation of:

(a) the terms and conditions of the Preretirement Survivor Annuity;

(b) the Participant's right to make, and the effect of, an election under (A) above to waive the coverage of the Preretirement Survivor Annuity;

(c) the rights of the Participant's spouse under (E) below;

(d) the right to make, and the effect of, a revocation of an election under (B) above; and

(e) the eligibility conditions, material features and relative values of any optional forms of benefit under the Plan.

(2) "Applicable Period" means, with respect to a Participant, whichever of the following periods ends last:

(a) the period beginning with the first day of the Plan Year in which the Participant attains age 32 and ending with the close of the Plan Year preceding the Plan Year in which the Participant attains age 35; or

(b) the period beginning one year prior to, and ending one year after, the date the individual becomes a Participant.

In the case of a Participant who separates from service before attaining age 35, the "Applicable Period" means in all events the period beginning one year before the separation from service and ending one year after such separation; provided that if such a Participant returns to service, the provisions of (a) and (b) above shall again apply.

(E) Spousal Consent. A waiver under (A) above (including any new waiver after any revocation of a prior waiver) shall not be effective with respect to a spouse of a Participant unless:

(1) such spouse consents in writing to such election, and such spouse's consent:

(a) acknowledges the effect of such election;

(b) acknowledges the specific Beneficiary or Beneficiaries to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse); and

(c) is witnessed by a Plan representative or a notary public; or

(2) it is established to the satisfaction of a Plan representative that the consent required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parenthetical of (1)(b) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and that the spouse voluntarily elects to relinquish such right.

(iv) Spouse's Election of Lump Sum. A Surviving Spouse entitled to a Preretirement Survivor Annuity may elect to receive a lump sum payment of the amount that would otherwise be applied to the purchase of such Annuity.

(n) Balance of Death Benefit. Upon the death of a Participant, prior to the commencement of benefit payments from his vested First Charter Account, his Beneficiary shall be entitled to a benefit equal to his vested First Charter Account, excluding any amount payable as a Preretirement Survivor Annuity. Payment to the Beneficiary shall be in a single sum distribution or periodic payments, to be made monthly or annually, of substantially equal amounts for a specified number of years, not to exceed ten (10) years.

The payment of a Participant's First Charter Account upon his death shall be administered separately from the payment upon death of his other subaccounts under the Plan. A separate Beneficiary designation form shall be used for the First Charter Account and any such forms on file for the First Charter Plan as of the Merger Date shall be controlling with respect to his First Charter Accounts under this Plan unless and until revoked or replaced in accordance with Plan procedures. The Beneficiary designation form used for the Plan subaccounts other than the First Charter Accounts shall not be relevant as to the disposition of the First Charter Accounts.

(o) Application of Forfeitures. Any forfeitures under the First Charter Plan that have not been applied pursuant to the provisions of that plan as of the Merger Date, shall be applied as provided in Section 6.2 of this Plan.

(p) Funding Entities. The Plan Assets attributable to the First Charter Plan shall be held in trust under the same trust agreement in effect immediately prior to the Merger Date; provided however the Plan Assets shall be available to pay

benefits under the entire surviving Plan. In its discretion, the Administrator shall combine the assets of such trust with The Fifth Third Profit Sharing Trust at such time as the Administrator deems appropriate.

2557185.1

TWENTY-FIRST AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended effective September 2, 2008, by completely amending and restating Appendix XXV to read as provided in the form attached hereto.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 4th day of September, 2008.

FIFTH THIRD BANK

By: /s/Nancy R. Phillips
Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN APPENDIX XXV

FIRST CHARTER CORPORATION AND SUBSIDIARIES

1. Eligibility.

(a) Definitions.

(i) First Charter Employee. For purposes of this Appendix, "First Charter Employee" means an individual who, immediately prior to the Effective Time, was an "Eligible Employee" as defined in the First Charter Corporation Retirement Savings Plan

(ii) First Charter Subsidiary. For purposes of this Appendix, "First Charter Subsidiary" means First Charter Corporation or a corporation which, immediately prior to the Effective Time, was a subsidiary (direct or indirect) of First Charter Corporation, as well as the surviving corporation of any merger or consolidation of such an entity with one or more subsidiaries (direct or indirect) of Fifth Third Bancorp. A corporation shall be considered a "First Charter Subsidiary" only while a subsidiary (direct or indirect) of Fifth Third Bancorp.

(iii) Effective Time. For purposes of this Appendix, "Effective Time" shall have the same meaning provided that term in the Amended and Restated Agreement and Plan of Merger by and among First Charter Corporation, Fifth Third Bancorp and Fifth Third Financial Corporation dated as of September 14, 2007.

(b) Exclusion of First Charter Employees Prior to Merger Date. Anything in the Plan to the contrary notwithstanding, in no event shall a First Charter Employee be considered an "Employee" or a "Participant" under the Plan prior to the Merger Date (as defined below). As such, prior to the Merger Date, in no event, shall a First Charter Employee be eligible to make contributions of any type under the Plan or to receive allocations of contributions of any type under the Plan.

In the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee. If he then, or upon re-hire, otherwise meets the Plan's definition of "Employee" in Section 2.19 of the Plan, he shall no longer be excluded from eligibility by reason of this paragraph 1(b).

(c) Eligibility of New, Re-hired and Transferred Employees of First Charter Subsidiaries Prior to Merger Date.

(i) Eligible Employers. For purposes of making certain individuals eligible "Employees" under the Plan, each First Charter Subsidiary shall be considered an Employer under the Plan. However, for purposes of eligibility under the Plan prior to the Merger Date, only the individuals meeting the requirements of (ii) below shall be considered eligible Employees of a First Charter Subsidiary.

(ii) Eligible Employees Prior to Merger Date. The following categories of individuals shall be

considered eligible "Employees" under the Plan prior to the Merger Date:

(A) an individual who is otherwise an eligible "Employee" (i.e. he meets the definition in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan) of a First Charter Subsidiary and who is not a First Charter Employee because his Employment Commencement Date is on or after the Effective Time;

(B) an Employee of an Employer (other than a First Charter Subsidiary) whose employment is transferred to a First Charter Subsidiary (provided the individual continues to meet the definition of "Employee" in Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan);

(C) an individual who was previously employed by a First Charter Subsidiary, who terminated employment with the First Charter Subsidiary and who is re-hired by a First Charter Subsidiary as an Employee (as otherwise defined in Section 2.19 of the Plan who is not ineligible under Section 3.4 of the Plan) on or after the Effective Time; and

(D) in the event a First Charter Employee's employment status changes such that he is no longer paid under the payroll system used by First Charter Corporation immediately prior to the Effective Time, he shall no longer be considered a First Charter Employee, and he shall at that time be considered an eligible Employee under the Plan provided he otherwise meets the Plan's definition of "Employee" in

Section 2.19 of the Plan and is not ineligible under Section 3.4 of the Plan.

(d) Eligibility upon Merger of First Charter Corporation Retirement Savings Plan. Effective upon the merger of the First Charter Corporation Retirement Savings Plan into this Plan, each First Charter Employee who otherwise meets the definition of "Employee" under this Plan shall be considered an Employee and Participant in this Plan, as provided in Section 3.1(a) (provided he is not ineligible under Section 3.4). As provided in Section 3.1(b), each such Employee shall be eligible to make 401(k) contributions, to receive matching contributions and to make after-tax contributions on and after the first pay date (following the Merger Date) following his completion of 30 days of Eligibility Service (counting service with First Charter Corporation as provided in paragraph 3(b) below).

2. Merger of First Charter Corporation Retirement Savings Plan.

(a) Merger. Effective as of July 10, 2008 (the "Merger Date"), the First Charter Corporation Retirement Savings Plan (the "First Charter Plan") is completely amended and restated and merged into this Plan. This Plan represents a continuation of the First Charter Plan, and contributions shall continue as provided in this Plan. Upon the merger, an individual who is not already a Participant (or Beneficiary) but who had an account in the First Charter Plan on the Merger Date, shall become a Participant (or Beneficiary).

(b) Investment, Recordkeeping and Administration Consolidation. In order to consolidate the investments, recordkeeping and administration in an orderly manner, the Administrator or its delegate shall establish a "Recordkeeping Combination Date" subsequent to the Merger Date. The Recordkeeping Combination Date shall be the date as of which the ongoing recordkeeping, administration and investments associated with the First Charter Accounts are combined with the ongoing recordkeeping, administration and investments of the Plan as a whole, subject to the provisions of this Appendix.

In order to accomplish such consolidation, the Administrator or its delegate, shall have complete discretion and authority to impose a blackout period during which affected Participants temporarily are unable to exercise such investment, withdrawal, distribution, loan and other rights under the Plan (including this Appendix) as may be determined by the Administrator or its delegate in it sole and absolute discretion.

3. Predecessor Plan and Crediting of Past Service. The First Charter Plan is a Predecessor Plan. Past service shall be credited as provided in (a) below for purposes of determining a Participant's nonforfeitable percentage under the Plan of those subaccounts subject to a vesting schedule. Past service shall be credited as provided in (b) below for purposes of determining a Participant's eligibility under Section 3.1(b) of the Plan (and paragraph 1(d) above).

(a) Crediting of Past Service for Vesting Purposes. For purposes of determining a Participant's Vesting Years, Service shall be determined under

Section 2.44(a)(4) with respect to the First Charter Plan. As such, Service under such Predecessor Plan shall be treated as Service under this Plan based on such Predecessor Plan's hour counting methodology through that Predecessor Plan's computation period ending December 31, 2007. Thereafter, the transition rule in Section 2.44(a)(4)(B) shall apply, and Service shall be credited under this Plan's elapsed time method. In no event shall there be any duplication of Service for the same period.

(b) Crediting of Past Service for Eligibility. For purposes of determining a Participant's "Eligibility Service" for eligibility under Section 3.1(b) and paragraph 1(d) above, to make 401(k) contributions, to receive matching contributions and to make after-tax contributions, Section 2.44(a)(4) shall be disregarded. Instead, a Participant's past service with First Charter Corporation or any subsidiary of First Charter Corporation, as well as service with any such entity after it became an Affiliate, shall be taken into account under the elapsed time method under rules comparable to the rules in Section 2.44(a)(1), (2) and (3) of the Plan. In all events there shall be no duplication of service for the same period.

The Administrator shall have the sole power and authority to determine Service under the foregoing.

4. Separate Accounting. The portion of a Participant's Account attributable to his accrued benefit under the First Charter Plan shall be separately accounted for under the Plan. A Participant shall have a First Charter Account which, as of the Merger Date, shall be equal to his accounts under the First Charter Plan as of such date. A Participant's

First Charter Account shall be adjusted in accordance with Section 7.2 and shall not share in any contributions or forfeitures allocated under the Plan (ongoing contributions under the Plan instead are reflected in the subaccounts referred to in Article 4 of the Plan). There shall be maintained for each Participant (in addition to the subaccounts referred to in Section 2.1 of the Plan) such of the following subaccounts of his First Charter Account as are necessary in order to separately account for the merger of the First Charter Plan into the Plan:

(a) a "First Charter 401(k) Account," which is attributable to a Participant's "Deferral Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(b) a "First Charter After-Tax Account," which is attributable to a Participant's "Extra Savings Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(c) a "First Charter Discretionary Contribution Account," which is attributable to a Participant's "Company Discretionary Contribution Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(d) a "First Charter Matching Account," which is attributable to a Participant's "Match Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(e) a "First Charter Money Purchase Account," which is attributable to a Participant's "Money Purchase Subaccount" and "Safe Harbor

Nonelective Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(f) a "First Charter Qualified Nonelective Account," which is attributable to a Participant's "Bank Savings Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

(g) a "First Charter Rollover Account," which is attributable to a Participant's "Rollover Subaccount" under the First Charter Plan, as adjusted in accordance with Section 7.2.

The foregoing subaccounts shall be considered to be part of the Participant's Account within the meaning of Section 2.1 of the Plan. A Participant's First Charter 401(k) Account and First Charter Qualified Nonelective Account shall be subject to the withdrawal and distribution limitations of Section 8.6 of the Plan.

Upon the spin-off of the First Charter Money Purchase Accounts referred to in paragraph 19 below, the First Charter Money purchase Accounts shall no longer be part of this Plan.

5. Investment of First Charter Account.

(a) General. On and after the Recordkeeping Combination Date, a Participant shall have the same Participant-directed investment rights as provided in Section 7.1(c)(2) of the Plan over his entire First Charter Account (including each of its subaccounts). In addition to the investment funds available under the Plan generally, the Federated Capital Preservation Fund investment option, as restricted in (c) below, shall be one of the available investment options for the First Charter Accounts. The Administrator or its delegate

shall have complete discretion and authority in the transition (mapping) from the separate investment options available with respect to the First Charter Accounts prior to the Recordkeeping Combination Date, to the investment funds available under the Plan generally.

(b) Fifth Third Stock Investment Option. As of the Record keeping Combination Date, the Fifth Third Stock Investment Option shall become part of the Fifth Third Stock Fund (as defined in Section 7.4 of the Plan).

(c) Federated Capital Preservation Fund. No new investments (through investment transfers or otherwise) may be made into the Federated Capital Preservation Fund. In accordance with rules or procedures established by the Administrator, a Participant may elect to transfer part or all of his First Charter Account out of the Federated Capital Preservation Fund and into other investment options available under the Plan. However, such amounts may not be transferred back into the Federated Capital Preservation Fund.

Effective on a date determined by the Administrator or its delegate subsequent to the Recordkeeping Combination Date, the Trustee shall eliminate the Federated Capital Preservation Fund as an investment option. Upon elimination of this investment option, any First Charter Accounts allocated to this investment option shall be re-allocated to such other investment fund under the Plan as the Administrator or its delegate, in its sole discretion, shall direct.

6. Vesting.

(a) Fully Vested Accounts. A Participant's rights to his First Charter 401(k) Account, First Charter After-Tax Account, First Charter Rollover Account, First Charier Money Purchase Account and First Charter Qualified Nonelective Account shall be nonforfeitable at all times.

(b) Vesting Schedule. A Participant shall have a nonforfeitable right to a percentage of his First Charter Matching Account and his First Charter Discretionary Contribution Account on the basis of the number of his Vesting Years with which he is credited, pursuant to the following vesting schedule:

Vesting Years	Nonforfeitable Percentage
Less than 2	0%
2	25%
3	50%
4	75%
5 or more	100%

Upon and after a Participant's attainment of age 65, if he is then in the service of the Employer or an Affiliate, he shall have a nonforfeitable right to his First Charter Matching Account and his First Charter Discretionary Contribution Account. In addition, the provisions of Section 6.1(f)(2)(B) and (C), (3), (4), (5) and (7) shall apply to a Participant's First Charter Matching Account his First Charter Discretionary Contribution Account.

(c) Other Vesting Provisions. Notwithstanding paragraph (b) above, a Participant shall be fully vested in his entire First Charter Account

provided the Administrator determines in its sole and absolute discretion that the Participant has been identified in writing by Fifth Third Bancorp (or any of its subsidiaries) for severance under Fifth Third Bancorp's severance policy in connection with the merger of First Charter Corporation into Fifth Third Financial Corporation (whether or not such Participant continues employment until his actual release date and actually receives severance pay).

7. Hardship Withdrawals. In the event of a Participant's incurrence of a hardship (as defined in Section 8.1), he may withdraw (while he is an Employee), from his First Charter 401(k) Account; provided however, the aggregate of any such withdrawals from his First Charter 401(k) Account may not exceed the aggregate of his "Deferral Contributions" under the First Charter Plan.

Hardship withdrawals after the Recordkeeping Combination Date shall be governed by Section 8.1 of the Plan. Such a withdrawal shall be made in a single sum consistent with Section 9.1(a) of the Plan.

8. In-Service Withdrawals After Age 59½. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter Account, excluding his First Charter Money Purchase Account, if he has reached age 59½. Such a withdrawal shall be made in a single sum.

9. First Charter After-Tax Account Withdrawal. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter After-Tax Account, no more

than once per Plan Year quarter. Such a withdrawal shall be made in a single sum.

10. Withdrawals from First Charter Rollover Account. A Participant who has not terminated employment shall have the right to make withdrawals (of all or a portion) from his First Charter Rollover Account, no more than once per Plan Year quarter. Such a withdrawal shall be made in a single sum.

11. Loans. Any outstanding loans as of the Merger Date shall continue to be administered in accordance with the terms of the First Charter Plan prior to the Merger Date. A Participant may borrow from his First Charter Account. Any new loan made on or after the Recordkeeping Combination Date may be made solely from the Participant's First Charter 401(k) Account and First Charter Rollover Account. Loans shall be subject to Section 7.6 except as follows:

(a) Except for the maximum loan limit under Section 7.6(c) for loans made prior to the Recordkeeping Combination Date, the limitations in Section 7.6 shall apply separately as between a Participant's loan privilege from his First Charter Account and his loan privileges from the remainder of his Account. As such, for loans made prior to the Record keeping Combination Date, the minimum loan from a Participant's First Charter Account hereunder is $1,000 and the minimum loan from other available Accounts under Section 7.6 is $1,000. The limitations in Section 7.6 shall not apply separately for loans on and after the Record keeping Combination Date.

(b) A Participant may have up to one loan outstanding from his First Charter Account and up to

one loan outstanding from other available subaccounts under Section 7.6. Effective as of the Recordkeeping Combination Date, a new loan will not be made to a Participant with any loans outstanding.

(c) A loan from the Participant's First Charter Account prior to the Recordkeeping Combination Date which is used to purchase the Participant's primary residence may be for a term up to fifteen years, but not extending beyond the date the Participant would attain age 65.

(d) The Administrator is authorized to administer the loan program as applied to the First Charter Account and such administration prior to the Recordkeeping Combination Date may vary from the administration otherwise applicable to loans under Section 7.6.

12. Distribution of Employer Stock. Notwithstanding anything to the contrary contained in the Plan, to the extent the portion of a Participant's First Charter Account is invested in the common stock of Fifth Third Bancorp (or a fund consisting primarily of the common stock of Fifth Third Bancorp), the Participant may elect, in accordance with rules and procedures established by the Administrator, to have shares of Fifth Third Bancorp stock distributed to him in any distributions of his First Charter Account (but not in any in-service withdrawal).

13. Forms of Payment/Administration of Distributions.

(a) Separate Administration Prior to Recordkeeping Combination Date. Prior to the Recordkeeping Combination Date, the Administrator

shall administer distributions of the First Charter Account separately from distributions of the other subaccounts of the Participant's Account; provided, however, the Participant's entire Account (including his First Charter Account) shall be taken into account for purposes of Sections 8.5(c)(1), 8.5(e) and 9.1(c) (regarding the $5,000 threshold for Participant consent and cash-out), and Sections 8.5(d), 9.4 and 9.10 (regarding the required beginning date and minimum distributions).

(b) Combined Administration On and After Recordkeeping Combination Date. Distributions on and after the Recordkeeping Combination Date shall not be separately administered and shall be administered under Section 9.1(b) of the Plan.

14. QJSA and QPSA Requirements as to First Charter Money Purchase Accounts.

(a) Applicability. A Participant's First Charter Money Purchase Account shall be subject to the Qualified Joint and Survivor Annuity and the Preretirement Survivor Annuity requirements described in 14 (b) and 15 (below). None of the other subaccounts of the First Charter Account shall be subject to such requirements. As such, upon the spin-off of the First Charter Money Purchase Accounts, described in 19 (below), the Qualified Joint and Survivor Annuity and Preretirement Survivor Annuity requirements shall have no further applicability to this Plan.

(b) Qualified Joint and Survivor Annuity.

(i) Automatic Form of Payment. The form of payment of a Participant's First Charter Money

Purchase Account shall be a Qualified Joint and Survivor Annuity (defined in (ii) below) unless the Participant has waived such Annuity pursuant to (iii) below.

(ii) Definition of Qualified Joint and Survivor Annuity.

(A) Married Participant. For a Participant who is married (including a Participant who is subject to an applicable qualified domestic relations order as described in Section 414(p) of the Code), "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant with a survivor annuity for the life of the Participant's Surviving Spouse which is one-half of the annuity payable during the joint lives of the Participant and such spouse.

(B) Single Participant. For a Participant who is not married, "Qualified Joint and Survivor Annuity" means an immediate annuity for the life of the Participant.

(C) Amount. The Qualified Joint and Survivor Annuity will be the amount of benefit which can be purchased with the Participant's nonforfeitable First Charter Money Purchase Account balance.

(iii) Waiver.

(A) Election Period. A Participant may waive the Qualified Joint and Survivor Annuity form of benefit at any time during a 180-day election period ending on the date as of which his benefit payments are to begin. Such waiver must be in

writing and must specify the optional form of benefit elected and the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(B) Revocation. A Participant may also revoke any waiver under (A) above during the election period thereunder. There shall be no limitation on the number of such elections and revocations permitted during such election period.

(C) Written Explanation. The Administrator shall provide to each Participant, no less than 30 days and no more than 180 days, prior to the date as of which his benefit payments are to begin (and consistent with such regulations as the Secretary of Treasury may prescribe), a written explanation of:

(1) the terms and conditions of the Qualified Joint and Survivor Annuity and the qualified optional survivor annuity,

(2) the Participant's right to make, and the effect of, an election under (A) above to waive the Qualified Joint and Survivor Annuity form of benefit,

(3) the rights of the Participant's spouse under (iv) below,

(4) the right to make, and the effect of, a revocation of an election under (B) above, and

(5) the eligibility requirements, material features and relative values of any optional forms of benefit under the Plan.

To the extent permitted by Treasury Regulations or pronouncements of the Internal Revenue Service, the Administrator may permit the Participant to waive the 30-day limit and/or to provide such written explanation after the annuity starting date.

(iv) Spousal Consent. A waiver of the Qualified Joint and Survivor Annuity shall not take effect with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(1) acknowledges the effect of such election,

(2) acknowledges the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse),

(3) acknowledges the specific optional form of benefit elected which may not be changed without spousal consent (except back to the Qualified Joint and Survivor Annuity) (or the consent of the spouse expressly permits changes by the Participant without any requirement of further consent by the spouse), and

(4) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent

required under (A) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parentheticals under (A)(2) and (3) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and a specific optional form or forms of benefit and that the spouse voluntarily elects to relinquish the rights so relinquished.

(c) Optional Forms of Benefit. Subject to an effective waiver of the Qualified Joint and Survivor Annuity, a Participant may, by filing the proper form with the Administrator, elect to receive his vested First Charter Money Purchase Account in one of the following forms:

(i) a single sum,

(ii) periodic payments, to be paid monthly, quarterly, semiannually or annually, in substantially equal amounts for a specified number of years (subject to Sections 9.4, 9.9 and 9.10), or

(iii) a qualified optional survivor annuity. Under a qualified optional survivor annuity, a married Participant is entitled to an immediate annuity which provides a lifetime benefit for the Participant and a lifetime benefit for his Surviving Spouse equal to 75% of the benefit payable to the Participant during their joint lives.

15. Preretirement Survivor Annuity for First Charter Money Purchase Account.

(a) General. A Participant's Surviving Spouse, if any, shall be entitled to a Preretirement Survivor Annuity from the Participant's vested First Charter Money Purchase Account if:

(i) the Participant dies before the commencement of benefit payments; and

(ii) the Participant has not elected under (c) below to waive the Preretirement Survivor Annuity.

(b) Definition of Preretirement Survivor Annuity. The "Preretirement Survivor Annuity" is an annuity which is for the life of a Participant's Surviving Spouse in the amount of benefit that can be purchased with 100 percent of the Participant's nonforfeitable First Charter Money Purchase Account balance as of the date of his death, and under which annuity payments commence as of a date (not later than December 31 of the calendar year in which the Participant would have attained age 70½) elected by such Surviving Spouse.

(c) Waiver of Preretirement Survivor Annuity.

(i) General. A Participant to whom 15(a) above applies may waive coverage of the Preretirement Survivor Annuity at any time during his election period under (iii) below. Such a waiver must be in writing and must specify the specific Beneficiary or Beneficiaries, if any, to whom any death benefits under the Plan will be payable.

(ii) Revocation. Any waiver under (i) above may be revoked at any time during the Participant's election period under (iii) below. There shall be no limitation on the number of such waivers and revocations permitted during such election period.

(iii) Election Period. For purposes of (i) and (ii) above, the election period shall be the period

(A) beginning on the earlier of

(1) the first day of the Plan Year in which the Participant attains age 35, or

(2) the date of the Participant's separation from service; provided however, if the Participant returns to service, then any election made prior to the first day of the Plan Year in which he attains age 35 shall be voided; and

(B) ending on the Participant's date of death.

(iv) Written Explanation.

(A) The Administrator shall provide to each Participant, within the "Applicable Period," as defined below, and consistent with such regulations as the Secretary of the Treasury may prescribe, a written explanation of:

(1) the terms and conditions of the Preretirement Survivor Annuity;

(2) the Participant's right to make, and the effect of, an election under (i) above to waive the coverage of the Preretirement Survivor Annuity;

(3) the rights of the Participant's spouse under (v) below;

(4) the right to make, and the effect of, a revocation of an election under (ii) above; and

(5) the eligibility conditions, material features and relative values of any optional forms of benefit under the Plan.

(B) "Applicable Period" means, with respect to a Participant, whichever of the following periods ends last:

(1) the period beginning with the first day of the Plan Year in which the Participant attains age 32 and ending with the close of the Plan Year preceding the Plan Year in which the Participant attains age 35; or

(2) the period beginning one year prior to, and ending one year after, the date the individual becomes a Participant.

In the case of a Participant who separates from service before attaining age 35, the "Applicable Period" means in all events the period beginning one year before the separation from service and ending one year after such separation; provided that if such a Participant returns to service, the provisions of (1) and (2) above shall again apply.

(v) Spousal Consent. A waiver under (A) above (including any new waiver after any revocation of a prior waiver) shall not be effective with respect to a spouse of a Participant unless:

(A) such spouse consents in writing to such election, and such spouse's consent:

(1) acknowledges the effect of such election;

(2) acknowledges the specific Beneficiary or Beneficiaries to whom any death benefits under the Plan will be payable, which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the Participant without any requirement of further consent by the spouse); and

(3) is witnessed by a Plan representative or a notary public; or

(B) it is established to the satisfaction of a Plan representative that the consent required under (i) above may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be provided in regulations of the Internal Revenue Service.

General consents referred to in the parenthetical of (A)(2) above must acknowledge that the spouse has the right to limit consent to a specific Beneficiary or Beneficiaries and that the spouse voluntarily elects to relinquish such right.

(d) Spouse's Election of Lump Sum. A Surviving Spouse entitled to a Preretirement Survivor Annuity may elect to receive a lump sum payment of the amount that would otherwise be applied to the purchase of such Annuity.

16. Balance of Death Benefit.

(a) Prior to Record keeping Combination Date. Upon the death of a Participant prior to the Record keeping Combination Date and prior to the commencement of benefit payments from his vested First Charter Account, his Beneficiary shall be entitled to a benefit equal to his vested First Charter Account, excluding any amount payable as a Preretirement Survivor Annuity. Payment to the Beneficiary shall be in a single sum distribution or periodic payments, to be made monthly or annually, of substantially equal amounts for a specified number of years, not to exceed ten (10) years.

The payment of a Participant's First Charter Account upon his death before the Recordkeeping Combination Date shall be administered separately from the payment upon death of his other subaccounts under the Plan. A separate Beneficiary designation form shall be used for the First Charter Account and any such forms on file for the First Charter Plan as of the Merger Date shall be controlling with respect to his First Charter Accounts under this Plan unless and until revoked or replaced in accordance with Plan procedures. The Beneficiary designation form used for the Plan subaccounts other than the First Charter Accounts shall not be relevant as to the disposition of the First Charter Accounts.

(b) On or After Record keeping Combination Date. In the case of the death of a Participant on or after the Record keeping Combination Date, the provisions in the Plan concerning the payment of a Participant's Account upon his death prior to the application of his Account for his benefit shall be

controlling for the entire Account (including the First Charter Account). (Since the First Charter Money Purchase Accounts will have been spun-off, the Preretirement Survivor Annuity provisions will no longer have any applicability in this Plan.) This includes Article 10 and the definition of Beneficiary (Section 2. 9). In such a case any separate Beneficiary designation form used for the First Charter Account shall have no further force and effect on and after the Record keeping Combination Date. Any Beneficiary designation form used for the Plan subaccounts other than the First Charter Accounts shall become controlling effective on the Recordkeeping Combination Date for the First Charter Account as well.

17. Application of Forfeitures. Any forfeitures under the First Charter Plan that have not been applied pursuant to the provisions of that plan as of the Merger Date, shall be applied as provided in Section 6.2 of this Plan.

18. Funding Entities. Prior to the Record keeping Combination Date, the Plan Assets attributable to the First Charter Plan shall be held in trust under the same trust agreement in effect immediately prior to the Merger Date; provided however the Plan Assets shall be available to pay benefits under the entire surviving Plan. In its discretion, the Administrator shall combine the assets of such trust with The Fifth Third Profit Sharing Trust at such time as the Administrator deems appropriate.

19. Money Purchase Pension Plan Spin-Off. As of the Record keeping Combination Date, the First Charter Money Purchase Accounts shall be transferred

to a new qualified tax-exempt plan established by Fifth Third Bancorp for this purpose.

A Participant in this Plan with a First Charter Money Purchase Account will become a Participant immediately in the spin-off plan upon such transfer. A Participant's beginning vested account balance in the spin-off plan shall be the same as the vested First Charter Money Purchase Account balance transferred on his behalf. The spin-off plan shall preserve the money purchase pension plan characteristics of the First Charter Money Purchase Accounts.

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TWENTY-SECOND AMENDMENT
TO
THE FIFTH THIRD BANCORP MASTER
PROFIT SHARING PLAN
(as amended and restated effective
as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Appendix I is amended by adding the following line item in the chart immediately following the "Franklin Financial Corporation (and subsidiaries)" line item, effective December 22, 2008:

Freedom Bank	II	

2. Effective December 22, 2008, Appendix II is amended by adding a new subsection (xx) to Section 1 to read as follows:

> (xx) Freedom Bank. Former employees of Freedom Bank, who became Employees on December 22, 2008 in connection with Fifth Third Bank's acquisition of certain assets of Freedom Bank, shall be credited with Service under Section 2.44 of the Plan for their service with Freedom Bank.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 10th day of February, 2009.

FIFTH THIRD BANK

By: /s/Nancy R. Phillips
Nancy R. Phillips, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

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TWENTY-THIRD AMENDMENT TO THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in order to satisfy the requirements of an interim good faith amendment required by the Final 415 Regulations published by the Department of Treasury on April 5, 2007, effective as of January 1, 2008, in the following respects:

1. Section 4.1(a)(1) is amended by adding the following sentence:

> A compensation reduction agreement can be made only with respect to Deferrable Compensation which also constitutes "compensation" within the meaning of section 415(c)(3) of the Code and section 1.415(c)-2 of the Treasury Regulations.

2. Section 5.1(a)(1) is amended by adding the following to the text in the parenthetical:

> and excluding restorative payments resulting from a fiduciary's actions for which there is a reasonable risk of liability

3. Section 5.1(d) is amended by adding the following thereto:

Except as follows, in order to be taken into account for a Limitation Year, Section 415 Compensation must be paid or treated as paid to an Employee prior to the Employee's severance from employment with the Employer. Compensation described below does not fail to constitute Section 415 Compensation merely because it is paid after the Employee's severance from employment with the Employer provided it is paid by the later of 2½ months after the severance or the end of the Limitation Year that includes the date of the severance. Compensation is subject to this rule if (A) it is regular compensation for services during the Employee's regular work hours or for services outside the Employee's regular working hours (such as overtime or shift differential), commissions, bonuses, or other similar payments, and (B) the payment would have been paid to the Employee prior to a severance from employment if the Employee had continued in employment with the Employer.

In addition, Section 415 Compensation shall include:

(A) Payments after severance from employment for the following, provided (i) the amounts are paid by the later of 2½ months after severance from employment or the end of the Limitation Year that includes the date of severance, and (ii) those amounts would have been included in the definition of Section 415 Compensation if they were paid prior to

the Employee's severance from employment with the Employer: unused accrued bona fide sick pay, vacation, or other leave if the Employee would have been able to use the leave if employment had continued or payments of nonqualified deferred compensation that are includible in gross income and that would have been paid to the Employee at the same time had his employment continued.

(B) Post-severance pay to an individual who does not currently perform services for the Employer by reason of qualified military service (as that term is defined in section 414(u)(1) of the Code) to the extent those payments do not exceed the amounts the individual would have received had he continued to perform services for the Employer rather than entering qualified military service.

(C) Post-severance pay to a Participant who is permanently and totally disabled, to the extent provided in applicable Treasury Regulations.

For any Limitation Year, only the first $230,000 (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of Section 415 Compensation shall be taken into account.

4. The heading of Section 5.2(b) is changed to read "Treatment of Excess Annual Additions Before 2008."

5. A new subsection 5.2(c) is added to Section 5.2 to reads as follows:

(c) Excess Annual Additions Corrections. Effective as of January 1, 2008, the correction methods for handling excess Annual Additions specified in Section 5.2(b) no longer apply. However, similar correction methods may be available under the IRS Employee Plans Compliance Resolution System.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 23 day of April, 2009.

FIFTH THIRD BANK

By: /s/Nancy R. Phillips
Nancy R. Phillips, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

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TWENTY-FOURTH AMENDMENT

TO

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN

(as amended and restated effective as of December 31, 2000)

Pursuant to the reserved power of amendment contained in Section 12.1 of The Fifth Third Bancorp Master Profit Sharing Plan (as amended and restated effective December 31, 2000) (the "Plan"), the Plan is hereby amended in the following respects:

1. Appendix I is amended by adding the following line item in the chart immediately following the "Resource Management, Inc. (dba Maxus Investment Group)" line item, effective April 1, 2009:

Skipjack Financial Services, Inc. and Transactive Ecommerce Solutions, Inc.	II	

2. Effective April 1, 2009, Appendix II is amended by adding a new subsection (xxi) to Section 1 to read as follows:

(xxi) Skipjack Financial Services, Inc. and Transactive Ecommerce Solutions. Inc. Former employees of Skipjack Financial Services, Inc. or Transactive Ecommerce Solutions, Inc., who became Employees on April 1, 2009 in connection with Fifth Third Bank's acquisition

of certain assets of Skipjack Financial Services, Inc. and Transactive Ecommerce Solutions, Inc., shall be credited with Service under Section 2.44 of the Plan for their service with Skipjack Financial Services, Inc. and Transactive Ecommerce Solutions, Inc.

However, Section 3.4 of the Plan shall continue to apply. As such, notwithstanding such crediting of Service, an Employee who falls into an ineligible class of Employees, as described in Section 3.4, shall not be eligible to Participate in the Plan, or to make or receive allocations of contributions or forfeitures under the Plan.

IN WITNESS WHEREOF, the undersigned Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, has caused this Amendment to be adopted this 13 day of May, 2009.

FIFTH THIRD BANK

By: /s/Nancy R. Phillips
Nancy R. Phillips, Chairman of The Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee

2924640.1

THE FIFTH THIRD PROFIT SHARING TRUST AGREEMENT
(as amended and restated)

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THE FIFTH THIRD PROFIT SHARING TRUST AGREEMENT (as amended and restated)

This amended and restated Trust Agreement and Declaration of Trust executed this 28 day of December, 2001, by and between Fifth Third Bank, an Ohio banking corporation in its individual corporate capacity (the "Employer"), and Fifth Third Bank, an Ohio banking corporation acting in its fiduciary capacity as trustee (the "Trustee").

WITNESSETH:

WHEREAS, the Employer has adopted and maintains the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"), and

WHEREAS, The Fifth Third Profit Sharing Trust (the "Trust") serves as the funding vehicle for the Plan,

WHEREAS, the Trust was established and is presently maintained pursuant to an amended and restated Trust Agreement and Declaration of Trust executed December 29, 1982, effective as of January 1, 1982, as subsequently amended by the First through Fifth Amendments,

WHEREAS, under Section 7.1 of the amended and restated Trust Agreement and Declaration of Trust, the Employer and the Trustee have the right to amend at any time,

WHEREAS, the Employer and the Trustee have determined to amend and restate the Trust Agreement and Declaration of Trust in its entirety as The Fifth

Third Profit Sharing Trust (as amended and restated), as herein stated, and

WHEREAS, this Trust Agreement and Declaration of Trust is intended to qualify under the provisions of sections 401(a) and 501(a) of the Internal Revenue Code of 1986, as amended.

NOW, THEREFORE, the Employer and the Trustee do hereby agree each with the other as follows.

ARTICLE 1

TITLE, PURPOSE AND DEFINITIONS

1.1 Title. The Trust established pursuant hereto shall be known as The Fifth Third Profit Sharing Trust (hereinafter referred to as the "Trust").

1.2 Purpose. The Trust is established for the purpose of holding the Plan Assets and for the exclusive benefit of Participants and their beneficiaries. Subject to the provisions of the Plan that are consistent with ERISA, it shall be impossible, by any means, and at any time before the satisfaction of all liabilities to Participants or their beneficiaries, for any part of the Plan Assets to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants and their beneficiaries.

1.3 Definitions. As used in this Trust Agreement, the following terms shall have the following meanings and provisions applicable thereto.

(a) "Administrator" means the individual, group of individuals, or entity appointed to administer the Plan; provided that if none is so appointed, then it means the Employer.

(b) "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

(c) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended, at the particular time applicable.

(d) "Participant" means a person who is a participant in the Plan.

(e) "Plan" means the Fifth Third Bancorp Master Profit Sharing Plan, and if amended at any time, then as so amended.

(f) "Plan Assets" means the assets of the Plan at the particular time applicable.

ARTICLE 2

CONTRIBUTIONS AND PAYMENTS

2.1 Receipt of Contributions. The Trustee shall receive any contributions paid to it in cash or in the form of such other property as it may from time to time deem acceptable and which shall have been delivered to it. The Trustee shall also receive a transfer of Plan Assets from any other funding vehicle of the Plan or predecessor plan in connection with a plan merger or plan-to-plan transfer. All contributions and transfers so received, together with the income therefrom and any other increment thereon, shall be held, invested, reinvested and administered by the Trustee pursuant to the terms of this Trust Agreement. The Trustee shall

not be responsible for the calculation or collection of any contribution or transfer under or required by the Plan, or for the determination of whether any contributions or transfers received by it are correct or are otherwise in compliance with the provisions of the Plan, but shall be responsible only as provided in this Trust Agreement for property received by it.

2.2 Payments from the Plan Assets.

(a) From time to time, upon the Trustee's receipt of written directions from the Administrator that payments from the Plan are due, the Trustee shall make such payments from the Plan Assets to such persons in such form, in such amounts and at such time as the Administrator shall have directed; provided however, the Trustee shall not be required to make any payment from the Plan Assets until it receives copies of such government filings and/or approvals as the Trustee may reasonably request; and provided further, contributions to the Plan shall be returned to the Employer only under those circumstances set forth in the Plan and consistent with ERISA.

(b) Upon the distribution of Plan Assets in accordance with (a) above, to the extent permitted by law; the Trustee shall be released and discharged from all further accountability or liability respecting such Plan Assets, shall be fully protected in making payments out of the Plan Assets in accordance with such written directions, shall have no responsibility to see to the application of such payments or to ascertain whether such directions comply with the provisions of the Plan, and shall have no responsibility for any payments made by it in good faith without actual

notice or knowledge of the changed condition or status of any person receiving such payments.

(c) If any payment directed to be paid from the Plan Assets is not claimed, then the Trustee shall notify the Administrator of that fact promptly. The Trustee and the Administrator shall work together to search for or ascertain the whereabouts of any payee under the Plan.

(d) If any dispute arises as to the persons to whom payment of any funds or delivery of any other Plan Assets should be made by the Trustee, then the Trustee may withhold such payment or delivery until such dispute shall have been determined by a court of competent jurisdiction or shall have been settled by the parties concerned.

(e) Plan Assets held hereunder shall be available to pay benefits under any and all parts of the Plan.

ARTICLE 3

INVESTMENT DUTIES AND POWERS OF THE TRUSTEE

3.1 Investment Duties. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee shall, except to the extent it deems it expedient (pending investment of Plan Assets or pending payment of current expenses or benefits of the Plan) to keep Plan Assets temporarily uninvested and in cash, invest and reinvest the principal and income of the Plan Assets and keep the Plan Assets invested, without being restricted to securities or property of the character authorized for investments by trustees under

the laws of any state, district or territory, in such securities and/or in such property, real or personal, tangible or intangible, or part interest therein, wherever situate, whether or not productive of income, or consisting of wasting assets, as the Trustee shall deem advisable.

3.2 Investment Powers. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee is authorized and empowered, in addition to powers granted under any applicable statutes, regulations or rules which, to the extent of their granting of powers applicable to trusts of a similar nature to the Trust, are incorporated herein by reference:

(a) to invest in any collective, common or pooled trust fund operated or maintained by any bank or trust company, including the Trustee or an affiliate of the Trustee, exclusively for the commingling and collective investment of monies or other assets held under or as a part of a plan which is established in conformity with and qualifies under section 401(a) of the Code; and, anything herein to the contrary notwithstanding, to the extent monies or other assets are transferred to such collective trust in exchange for an interest in such collective trust, the terms and conditions of such collective trust, as amended from time to time, shall govern the investment duties, responsibilities and powers of the trustee of such collective trust and, to the extent required by law, such terms, responsibilities and powers shall be incorporated herein by reference and shall be a part of this Trust Agreement; and, for purposes of valuation, the value of the interest maintained by the Plan Assets

in such collective trust shall be the fair market value of the collective fund units held by the Trustee determined in accordance with generally recognized valuation procedures;

(b) to purchase and subscribe for any securities or other property and to retain such securities or other property in trust;

(c) to sell at public or private sale, for cash, or upon credit, or otherwise dispose of any property, real or personal, and no person dealing with the Trustee shall be bound to see to the application or to inquire into the validity, expediency or propriety of any such sale or other disposition;

(d) to exercise any conversion privilege, subscription right or other option pertaining to or in connection with securities or other property held by it;

(e) to exercise itself, or by general or limited power of attorney, any right, including the right to vote, incident to any securities or other property held by it;

(f) to join in, dissent from or oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which it may hold stocks, bonds or other securities or in which it may be interested, to pay any expenses, assessments or subscriptions in connection therewith, and to accept and to hold any other securities issued in connection therewith;

(g) to register any investment held in the Plan Assets in its own name or in the name of a nominee or to hold any investment in bearer form;

(h) to employ suitable agents, accountants and counsel and to pay their reasonable expenses and compensation;

(i) to hold any part or all of the Plan Assets uninvested;

(j) to invest in savings accounts, certificates of deposit and other deposits which bear a reasonable rate of interest, with any financial institution or quasi financial institution, either domestic or foreign, including any such financial institution operated or maintained by any Trustee (or an affiliate) in its corporate capacity;

(k) to form corporations and partnerships and to create trusts to hold title to any securities or other property, all upon such terms and conditions as it may deem advisable;

(l) to invest in open-end investment companies (mutual funds) and closed-end investment companies, investment trusts, and in any partnership, limited or unlimited, joint venture or other form of joint enterprise created for any lawful purpose;

(m) to adjust, settle, contest, compromise and arbitrate any claims, debts, or damages due or owing to or from the Plan Assets, and to sue, commence or defend any legal proceedings in reference thereto;

(n) to borrow money upon such terms and conditions as may be deemed advisable to carry out the purposes of the Trust and to pledge securities or other property in repayment of any such loan; provided, however, that loans or advances may be made by the

Trustee by way of overdrafts or otherwise on a temporary basis on which no interest is payable;

(o) to enter into any type of contract with any insurance company or companies, either for the purposes of investment or otherwise, and, to the extent the Plan so provides, to purchase any life insurance policy or annuity contract;

(p) to buy, sell, and deal in options as writer of call options against securities, stocks, convertible preferred stocks, convertible bonds and warrants, which are owned by the Trust, to repurchase written call options in a closing transaction, to deliver the securities for cash if the option is exercised, to buy put options for securities, stock, convertible preferred stock, convertible bonds and warrants, which are owned by the Trust, to resell put options, in a closing transaction and to deliver the securities for cash if the option is exercised;

(q) to appoint an investment manager, as defined in section 3(38) of ERISA, to manage (including the power to acquire and dispose of) any of the Plan Assets;

(r) to make, execute and deliver as Trustee any and all deeds, leases, mortgages, advances, contracts, waivers, releases or other instruments in writing necessary or proper in the employment of any of the foregoing powers; and

(s) to exercise, generally, any of the powers which an individual owner might exercise in connection with property either real, personal or mixed held in the Plan Assets, and to do all other acts that the Trustee may deem necessary or proper to carry out

any of the powers set forth in this Article 3 or otherwise in the best interests of the Trust.

3.3 Power of Participants to Direct Investments.

(a) Selection of Investment Funds. Under the Plan's funding policy, each Participant (and where applicable, Beneficiary and alternate payee) may elect the manner in which his Account (excluding his Employer Matching Account) and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The Administrator shall have the discretionary authority and fiduciary duty to determine the investment funds to be made available, from time to time, for this purpose. However, in all events, the Fifth Third Stock Fund, as described in Section 3.4(a)(1) below, shall be an investment option. The Administrator shall have the duty of monitoring such investment funds to determine the continued prudence of offering such funds; and the Administrator shall change the investment funds available if and when it deems it prudent to do so.

(b) Segregated Investment Funds. In addition to such investment vehicles as mutual funds and collective or common trust funds, the Administrator may prescribe as an investment option a fund the Trustee creates by segregating a portion of the Plan Assets. The Trustee shall have full discretionary authority and responsibility to manage any such fund in accordance with the general nature and objective of the fund as directed by the Administrator (such as a "balanced" fund).

(c) Procedures. The Administrator and the Trustee shall be responsible for implementing the Participant (and, where applicable, Beneficiary and alternate payee) investment elections under such rules and procedures as may be prescribed under the Plan. Neither the Trustee, the Employer nor the Administrator shall be under any duty or obligation to review the selection of investment funds by Participants (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any fiduciary responsibility whatsoever in connection with the selection of investment funds by a Participant (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any liability or responsibility for action taken pursuant to the direction of the Participants (and, where applicable, Beneficiaries and alternate payees).

3.4 Fifth Third Bancorp Stock.

(a) Investments. The Trustee is expressly permitted to invest Plan Assets in common stock of Fifth Third Bancorp without limit, subject to the following:

(1) The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall

have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(2) The Trustee is expressly permitted, in its discretion, to invest Plan Assets in addition to those segregated in the Fifth Third Stock Fund, in common stock of Fifth Third Bancorp.

(b) Employer Matching Account. Subject to the diversification rights and other relevant provisions of the Plan, the Employer Matching Accounts under the Plan shall be invested in the Fifth Third Stock Fund.

(c) Voting of Shares.

(1) Anything in this Trust Agreement to the contrary notwithstanding, in the case of Fifth Third Bancorp common stock held in the Fifth Third Stock Fund, the Trustee shall exercise voting and other rights pertaining to any shares of Fifth Third Bancorp so held in accordance with any instructions received from the Participant (or beneficiaries) for whose account such shares are held. In the event that any Participant (or beneficiary) shall fail to so instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(2) In the case of Fifth Third Bancorp common stock held outside of the Fifth Third Stock Fund, the Trustee shall have the same power to

act (or refrain from acting) with respect to any voting or other right as it has with any other Plan Asset.

ARTICLE 4

COMPENSATION, EXPENSES, AND ACCOUNTS

4.1 Compensation. The Trustee shall be entitled to such compensation for services rendered by it as may be agreed upon in writing from time to time between the Employer and the Trustee.

4.2 Trust Expenses. The expenses incurred by the Trustee in the performance of its duties, including fees for legal services, and such compensation to the Trustee as may be provided for pursuant to Section 4.1, and all other proper charges and disbursements of the Trustee, shall be paid by the Employer; provided however, the Employer may direct the payment of any or all such expenses from the Plan Assets.

4.3 Tax Assessments. The Trustee shall notify the Employer with regard to any tax assessments which it receives on any income or property maintained in the Plan Assets and, unless notified to the contrary by the Employer at least ten (10) days before the tax is due, shall pay any such assessments from the Plan Assets. If the Employer notifies the Trustee within said period that in its opinion or in the opinion of counsel such assessments are invalid or that they should be contested, then the Trustee shall take whatever action is indicated in the notice received from the Employer or counsel, including contesting the assessment or litigating any claims.

4.4 Accounts, Records, Reports and Valuations.

(a) The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements and other transactions under the Trust and all such accounts and other records relating thereto shall be open to inspection and audit at all reasonable times by any person designated by the Employer. Within thirty (30) days following the close of the fiscal year of the Trust, the Trustee shall make a valuation of the Plan Assets (other than any insurance contracts) at fair market value as of the last day of such fiscal year and shall file with the Employer a written copy of such valuation and a written account setting forth all investments, receipts, disbursements and other transactions effected by it under the Trust during such fiscal year. To the extent permitted by law, but subject to any express provision of applicable law as may be in effect from time to time to the contrary, no person other than the Employer may require an accounting or bring any action against the Trustee with respect to the Plan Assets or its actions as Trustee.

(b) All accounts and records maintained by the Trustee with respect to the Plan Assets shall be preserved for such period as may be required under any applicable law. Upon the expiration of any such required retention period, the Trustee shall have the right to destroy such records and accounts after first notifying the Employer of its intention and transferring to the Employer any such accounts and records requested by it. The Trustee shall have the right to preserve all accounts and records in original form, or on microfilm, magnetic tape, or any other similar process.

(c) The Trustee shall make such periodic reports to the Employer as the Trustee shall deem necessary and proper and such other reports as the Employer may reasonably request, including a valuation of the Plan Assets at fair market value as of any date requested by the Employer.

ARTICLE 5

ACTIONS OF THE TRUSTEE

5.1 General Fiduciary Duties of the Trustee. The Trustee acknowledges that it assumes the fiduciary duties established by this Trust Agreement and imposed by law. Subject to the provisions of the Plan which are consistent with ERISA and which permit Plan Assets to be returned to the Employer, the Trustee shall discharge its duties with respect to the Plan solely in the interest of the Participants and beneficiaries and for the exclusive purpose of providing benefits to such Participants and their beneficiaries and defraying reasonable expenses of administering the Plan, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and by diversifying the investments of the Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, all in accordance with the provisions of this Trust Agreement insofar as they are consistent with the provisions of ERISA, as this Trust Agreement and ERISA may be from time to time amended.

5.2 Extent of Responsibilities. The Trustee shall have only such responsibilities as are stated in this Trust Agreement; provided however, to the extent that the Trustee is the payor of benefits under the Plan, the plan administrator (as defined in section 414(g) of the Code) of the Plan may, subject to providing the Trustee with such information as the Secretary of the Treasury may require, direct the Trustee to withhold applicable federal income taxes under and in accordance with section 3405 of the Code; and provided further, in addition to such responsibilities as stated herein, the Employer and the Trustee may agree that the Trustee shall have the ministerial function of maintaining Participants' accounts in accordance with information, interpretations, and directions from the Administrator. The Trustee shall have no discretionary responsibility for the administration of the provisions of the Plan.

5.3 Court Approval. At no time during the administration of this Trust shall the Trustee be required to obtain any court approval of any act required of it in connection with the performance of its duties or in the performance of any act required of it, in the administration of its duties as Trustee. The Trustee shall have full authority to exercise its judgment in all matters and of all times without court approval of such decisions; provided, however, that if any application to or proceeding or action in the courts is made, only the Employer and the Trustee shall be necessary parties, and no Participant in the Plan or other person having an interest in the Plan shall be entitled to any notice or service of process. Any judgment entered in such proceeding or action shall be conclusive upon all persons claiming an interest under the Plan.

5.4 Rights of Reliance by the Trustee.

(a) Counsel. The Trustee may consult with legal counsel (who may be of counsel to the Employer) concerning any question which may arise with reference to its duties under this Trust Agreement

(b) Directions, Statements, and Certificates. The Employer shall furnish the Trustee from time to time with a written list of those persons authorized to give directions, statements, or certificates to the Trustee, and the Trustee shall be entitled to rely upon such list and shall not be charged with notice of any change with respect thereto until the Employer shall have furnished the Trustee with a new written list evidencing such change. The Trustee shall be entitled to rely upon any direction, statement, certificate, or other communication believed by it to be genuine and to be from the Employer or any such person to the full extent permitted by law.

(c) Plan Qualification. The Employer shall furnish the Trustee with copies of all determination letters from the Internal Revenue Service relating to the qualification of the Plan under section 401 of the Code, and the Trustee may rely upon such letters.

5.5 Bond. The Trustee shall not be required to give any bond or any other security for the faithful performance of its duties under this Trust Agreement, except such as may be required by a law which prohibits the waiver thereof.

ARTICLE 6

RESIGNATION, REMOVAL AND SUCCESSION OF THE TRUSTEE

6.1 Resignation and Removal. A Trustee may be removed by the Employer at any time by notice in writing to the Trustee. The Trustee may resign at any time upon sixty (60) days' notice in writing to the Employer. Within thirty (30) days after such removal or resignation, the Trustee shall file with the Employer a written report setting forth all investments, receipts and disbursements and other transactions effected by the Trustee since the end of the preceding Trust Year. Such report shall contain an exact description of all securities and property purchased and sold, the cost or net proceeds of sale (excluding accrued interest paid or received) and shall further indicate such assets held to such date of removal or resignation, together with the cost of each item thereof, as carried on the books of the Trustee.

6.2 Successor. Upon removal or resignation of the Trustee, but in no event more than sixty (60) days thereafter, the Employer shall designate and procure acceptance by, a successor trustee to act hereunder with the same powers and duties as those conferred upon the removed or resigning Trustee. Upon such designation, and upon the written acceptance of such successor, the resigning or removed Trustee shall assign, transfer and pay over to such successor the assets then constituting the Plan Assets; provided, however, that the resigning or removed Trustee is authorized to reserve such sum of money (and for that purpose to liquidate such property as may be necessary to produce such sum) as may seem advisable for

payment of all proper charges against the Plan Assets including proper and reasonable expenses in connection with such resignation or removal, and any balance of such reserve remaining after the payment of such charges shall be paid over to the successor. Upon the payment and delivery to any successor of all the Plan Assets, and after full settlement of accounts, the responsibilities of the resigning or removed Trustee shall terminate.

ARTICLE 7

AMENDMENT AND TERMINATION

7.1 Amendment.

(a) This Trust Agreement may be amended by the Employer and the Trustee in accordance with the amendment procedures set forth in (b) below. Any amendment may be made effective retroactively if necessary to bring the Trust into conformity with governmental regulations which must be complied with in order to make the Plan or Trust eligible for tax benefits. No amendment shall operate to deprive any Participant or beneficiary of any vested rights or benefits accrued to him prior to such amendment, nor shall any amendment or modification cause or authorize any part of the Plan Assets to revert to or be refunded to the Employer, except as otherwise provided in the Plan and consistent with ERISA.

(b) Any amendment of this Trust Agreement on behalf of the Employer shall be by action of the Fifth Third Bank Pension and Profit Sharing Committee or by the Director of Legal/Human Resources of the Bank. If an amendment is being made by the Committee, it must be approved by a majority of

the members of the Committee as constituted at the time of adoption of the amendment. Any amendment approved in accordance with this paragraph may be given retroactive effect as determined by said Committee or the Director of Legal/Human Resources, as the case may be. An amendment must be in writing, duly executed and acknowledged by the Director of Legal/Human Resources or an individual with authority from said Committee to execute the amendment on behalf of the Employer and by a trust officer on behalf of the Trustee.

7.2 Termination.

(a) This Trust Agreement and the Trust created hereby may be terminated at any time by the Employer and upon such termination, the Plan Assets shall be paid out by the Trustee as and when directed by the Administrator pursuant to Section 2.2.

(b) Upon such termination of the Trust in whole or in part, the Trustee shall have a right to have its accounts settled.

(c) When the Plan Assets shall have been applied or distributed as provided herein, then the Trustee shall be released and discharged from all further accountability or liability respecting the Plan Assets (or that part of the Plan Assets so applied or distributed if the Trust is terminated only in part) or any part thereof so applied or distributed and shall not be responsible in any way or to any person for the further disposition of the Plan Assets (or that part of the Plan Assets so applied or distributed, if the Trust is terminated only in part) or any part thereof so applied or distributed.

ARTICLE 8

MISCELLANEOUS

8.1 Headings. The headings are for reference only. In the event of a conflict between a heading and the content of a Section, the content of the Section shall control.

8.2 Gender and Number. Except when otherwise indicated by the context, the genders of pronouns and the singular and plural numbers of terms shall be interchangeable.

8.3 Governing Law. This Trust shall be deemed to be an Ohio trust and shall in all respects be construed and regulated by the laws of the State of Ohio, except where such laws are preempted by the Code or by ERISA.

8.4 Successors. This Trust Agreement shall be binding upon, and the powers herein granted to the Employer and the Trustee, respectively, shall be exercisable by the respective successors and assigns of the Employer and the Trustee. Any corporation which shall, by merger, consolidation, purchase or otherwise, succeed to substantially all the trust business of the Trustee, upon such succession and without any appointment or other action by any person, shall be and become successor trustee hereunder.

8.5 Participant's Interest. Except as otherwise provided in the Plan or this Trust Agreement, no Participant or beneficiary under the Plan shall have any interest in or right to the Plan Assets and, to the full extent of all applicable laws, the assets of this Trust shall not be subject to any form of attachment,

garnishment, sequestration, or other actions afforded creditors of any Participant or beneficiary.

8.6 Severability. In case any provision of this Trust Agreement shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of this Trust Agreement, and this Trust Agreement shall be construed and interpreted as if such illegal or invalid provision had never been a part of it.

IN WITNESS WHEREOF, the parties have caused this Trust Agreement to be executed by their duly authorized officers as of the day and year first above written.

FIFTH THIRD BANK (In its fiduciary capacity to act as Trustee) as the Trustee	FIFTH THIRD BANK (In its individual corporate capacity) as the Employer
BY: /s/Brian S. Thamann, AVP	By: /s/Paul L. Reynolds

919566.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Case No. 1:08cv538-SSB
Consolidated with Case No. 1:08cv421-SSB

(Chief Judge Sandra S. Beckwith)
(Magistrate Judge Mark R. Abel)

[Filed October 31, 2012]

JOHN DUDENHOEFFER, *et al.*,	)
	)
Plaintiffs,	)
	)
-v-	)
	)
FIFTH THIRD BANCORP, *et al.*,	)
	)
Defendants.	)
	)

FIFTH THIRD DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Defendants Fifth Third Bancorp, Kevin T. Kabat, and the members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee[1] (collectively, "Fifth Third Defendants"), for their Answer to the Amended Consolidated Class Action

[1] The members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee named as Defendants in this action include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan, and Mary Tuuk.

Complaint ("Complaint") filed by Plaintiffs John Dudenhoeffer and Alireza Partovipanah (collectively, "Plaintiffs"), state as follows:

All allegations in the Complaint are denied except as expressly admitted in this Answer.

1. Paragraph 1 of the Complaint contains characterizations of the claims and allegations of the Complaint to which no response is required. To the extent that a response is required, Fifth Third Defendants specifically deny the allegation that they acted as fiduciaries of the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to the alleged actions and inactions that form the basis of the claims set forth in the Complaint. Further answering, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny all remaining allegations contained in Paragraph 1 of the Complaint.

2. Fifth Third Defendants admit that Fifth Third Bancorp is the Plan Sponsor. Fifth Third Defendants admit that the Plan is a retirement plan, but that it is also an employee stock ownership plan ("ESOP"). Fifth Third Defendants deny that Exhibit A and Exhibit B are the only Summary Plan Descriptions during the time period set forth in the Complaint, July 17, 2007 through the present. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 2 of the Complaint.

3. Fifth Third Defendants deny the allegations of Paragraph 3 of the Complaint.

4. Fifth Third Defendants deny the allegations of Paragraph 4 of the Complaint.

5. Paragraph 5 of the Complaint contains characterizations of the claims and allegations of the Complaint to which no response is required. To the extent that a response is required, Fifth Third Defendants state that the Congressional purpose for ESOPs is different from the purpose cited in Paragraph 5 of the Complaint. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 5 of the Complaint.

6. Paragraph 6 of the Complaint contains characterizations of the claims and allegations of the Complaint to which no response is required. Fifth Third Defendants deny all remaining allegations contained in Paragraph 6 of the Complaint.

7. Paragraph 7 of the Complaint contains characterizations of the claims and allegations of the Complaint to which no response is required. Fifth Third Defendants deny all remaining allegations contained in Paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint contains characterizations of the claims and allegations of the Complaint to which no response is required. Fifth Third Defendants deny all remaining allegations contained in Paragraph 8 of the Complaint.

9. Fifth Third Defendants deny the allegations of Paragraph 9 of the Complaint.

10. Paragraph 10 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required. To the extent that a

response is required, Fifth Third Defendants specifically deny that either Plaintiff Dudenhoeffer or Plaintiff Partovipanah has standing to pursue claims on behalf of the Plan under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). Further answering, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny that the relief sought by Plaintiffs in the Complaint are available remedies under ERISA. Fifth Third Defendants deny all remaining allegations contained in Paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required. To the extent that a response is required, Fifth Third Defendants specifically deny that either Plaintiff Dudenhoeffer or Plaintiff Partovipanah has standing to pursue claims on behalf of the Plan under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). Further answering, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny all remaining allegations contained in Paragraph 11 of the Complaint.

12. Paragraph 12 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required. To the extent that a response is required, Fifth Third Defendants specifically deny that Plaintiffs have any legal right to further amend their Complaint. Fifth Third Defendants deny all remaining allegations contained in Paragraph 12 of the Complaint.

13. Paragraph 13 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 13 of the Complaint.

14. Fifth Third Defendants aver that the allegations contained in Paragraph 14 are of no legal significance, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 14 of the Complaint.

15. Paragraph 15 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 15 of the Complaint.

16. Paragraph 16 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required.

To the extent that a response is required, Fifth Third Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16, and therefore, deny the allegations. Further answering, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Fifth Third Defendants deny all remaining allegations contained in Paragraph 16 of the Complaint.

17. Paragraph 17 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Fifth Third Defendants deny all remaining allegations contained in Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 18 of the Complaint.

19. Paragraph 19 of the Complaint contains characterizations of the allegations of the Complaint

and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 19 of the Complaint.

20. Paragraph 20 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that class action status is warranted. The relief requested is relief for the Plan as a whole, which is a single legal entity. Any one Plan participant can seek this relief on behalf of the Plan such that a class action is not necessary. Further answering, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Fifth Third Defendants deny all remaining allegations contained in Paragraph 20 of the Complaint.

21. Paragraph 21 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny that Plaintiffs' allegations satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 21 of the Complaint.

22. Paragraph 22 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants specifically deny that either Plaintiff Dudenhoeffer or Plaintiff Partovipanah has standing to pursue claims on behalf of the Plan under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). Fifth Third Defendants deny the allegations that Plaintiffs represent a class. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 22 of the Complaint.

23. Fifth Third Defendants do not dispute subject matter jurisdiction generally.

24. Fifth Third Defendants do not dispute personal jurisdiction generally.

25. Fifth Third Defendants do not dispute venue generally.

26. Fifth Third Defendants deny each and every allegation contained in Paragraph 26 of the Complaint, except admit that Plaintiff John Dudenhoeffer is a former Fifth Third employee.

27. Fifth Third Defendants deny each and every allegation contained in Paragraph 27 of the Complaint, except admit that Plaintiff Alireza Partovipanah is a former Fifth Third employee.

28. Fifth Third Defendants admit that Fifth Third Bancorp is an Ohio corporation with its principal place of business at 38 Fountain Square Plaza, Cincinnati, Ohio, 45263. Fifth Third Defendants admit that Fifth Third is a diversified financial services

company. Fifth Third Defendants further specifically admit that the remaining allegations contained in paragraph 28 accurately reflect "Defendant Fifth Third" at one point during the alleged class period, but deny that the allegations accurately reflect "Defendant Fifth Third" for the entire alleged class period. Fifth Third Defendants deny all remaining allegations contained in Paragraph 28 of the Complaint.

29. Fifth Third Defendants admit that Fifth Third Bank had the power, consistent with the terms of the Trust Agreement, to remove the Trustee of the Plan as of the filing date of the Complaint. Fifth Third Defendants deny all remaining allegations contained in Paragraph 29 of the Complaint.

30. Fifth Third Defendants deny the allegations of Paragraph 30 of the Complaint.

31. Paragraph 31 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants admit that Defendant Kevin T. Kabat, is, and was at all times relevant to this action, Chief Executive Officer ("CEO") and President of Fifth Third Bancorp. Fifth Third Defendants deny all remaining allegations contained in Paragraph 31 of the Complaint.

32. Paragraph 32 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants admit that Defendant The Fifth Third Bank Pension, Profit Sharing and Medical Plan

Committee (the "Pension and Profit Sharing Committee"), during part of the time relevant to this action, was the administrator of the Plan. Fifth Third Defendants deny all remaining allegations contained in Paragraph 32 of the Complaint.

33. Paragraph 33 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny the incomplete and inaccurate quotation from, and characterization of, the Fifth Third Recitals of the purported allocated powers and authorities of the Pension and Profit Sharing Committee set forth in Paragraph 33 of the Complaint. Fifth Third Defendants deny all remaining allegations contained in Paragraph 33 of the Complaint.

34. Paragraph 34 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny each and every allegation contained in Paragraph 34, except admit that:

(a) Paul L. Reynolds, during part of the time relevant to this action, was a member of the Pension and Profit Sharing Committee and Director of Legal/Human Resources, signed the Trust Agreement attached as an exhibit to the Complaint, and signed the Plan Document attached as an exhibit to the Complaint;

(b) Nancy Phillips, during part of the time relevant to this action, was Executive Vice

President, Chief Human Resources Officer and a member of the Pension and Profit Sharing Committee.

(c) Greg D. Carmichael, during part of the time relevant to this action, was Executive Vice President, Chief Operating Officer and a member of the Pension and Profit Sharing Committee.

(d) Robert Sullivan, during part of the time relevant to this action, was Senior Executive Vice President and a member of the Pension and Profit Sharing Committee.

(e) Mary Tuuk, during part of the time relevant to this action, was Executive Vice President, Chief Risk Officer and a member of the Pension and Profit Sharing Committee.

35. Paragraph 35 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required.

36. Paragraph 36 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny the allegations of Paragraph 36 of the Complaint.

37. Paragraph 37 of the Complaint contains characterizations of the allegations of the Complaint and legal conclusions to which no response is required. To the extent that a response is required, Fifth Third Defendants deny each and every allegation contained

in Paragraph 37 of the Complaint, except admit that the Plan is a defined contribution plan and ESOP.

38. Fifth Third Defendants admit that the Plan is a voluntary contribution plan. Fifth Third Defendants admit that Plan participants make contributions to the Plan and direct the Plan to purchase investments from a list of investment options offered to Plan participants, and such investments are allocated to Plan participants' individual accounts. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 38 of the Complaint to the extent they are not consistent with the Plan documents.

39. Fifth Third Defendants admit the allegations contained in Paragraph 39 of the Complaint.

40. Fifth Third Defendants deny all allegations contained in Paragraph 40 of the Complaint to the extent they are not consistent with the Plan documents and 2007 Summary Plan Description ("2007 SPD") referenced in Paragraph 40 of the Complaint. Further answering, Fifth Third Defendants state that the Plan documents and 2007 SPD speak for themselves.

41. Fifth Third Defendants state that Fifth Third's June 27, 2008 Form 11-K speaks for itself. Fifth Third Defendants deny each and every allegation contained in Paragraph 41 of the Complaint to the extent they are not consistent with the Plan documents. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

42. Fifth Third Defendants admit that Fifth Third Bank served as Trustee of the Plan as of the filing date of the Complaint. Fifth Third Defendants

deny all remaining allegations contained in Paragraph 42 to the extent they are not consistent with the Plan documents. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

43. Fifth Third Defendants state that Fifth Third's June 27, 2008 Form 11-K speaks for itself. Fifth Third Defendants deny each and every allegation contained in Paragraph 43 of the Complaint to the extent they are not consistent with the Plan documents. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

44. Fifth Third Defendants admit that at the beginning of the class period the Plan document required Fifth Third's matching contributions to be initially invested in the Fifth Third Stock Fund, but that they could be immediately moved to other investment options subsequent to initial investment. During the class period, the Plan was amended so that it no longer required matching contributions to be invested initially in the Fifth Third Stock Fund. Fifth Third Defendants deny all remaining allegations contained in Paragraph 44 to the extent they are not consistent with the Plan documents. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

45. Fifth Third Defendants admit the allegations contained in Paragraph 45 of the Complaint.

46. Fifth Third Defendants deny each and every allegation contained in Paragraph 46 of the Complaint to the extent they are not consistent with the Plan documents and The Fifth Third Profit Sharing Trust Agreement ("Trust Agreement"). Further answering,

Fifth Third Defendants state that the Plan documents and Trust Agreement speak for themselves.

47. Fifth Third Defendants deny each and every allegation contained in Paragraph 47 of the Complaint to the extent they are not consistent with the Plan documents and Trust Agreement. Fifth Third Defendants state that the Plan document mandates that the Fifth Third Stock Fund be offered as an investment option. Further answering, Fifth Third Defendants state that the Plan documents and Trust Agreement speak for themselves.

48. Fifth Third Defendants deny each and every allegation contained in Paragraph 48 of the Complaint to the extent they are not consistent with the Plan documents. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

49. Fifth Third Defendants deny that the Plan incorporates by reference any SEC filings. Rather, the SEC-required Prospectus required to be filed by Fifth Third, in a non-fiduciary capacity in order to comply with securities law, incorporated certain SEC filings by reference. Fifth Third Defendants deny all remaining allegations in Paragraph 49 of the Complaint to the extent they are not consistent with the Prospectus. Further answering, Fifth Third Defendants state that the Prospectus speaks for itself.

50. Fifth Third Defendants state that Fifth Third's 2008 Form 11-K and 2009 Form 11-K speak for themselves. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 50 of the Complaint.

51. Fifth Third Defendants deny each and every allegation contained in Paragraph 51 of the Complaint.

52. Fifth Third Defendants aver that the allegations contained in Paragraph 52 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

53. Fifth Third Defendants aver that the allegations contained in Paragraph 53 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

54. Fifth Third Defendants deny each and every allegation contained in Paragraph 54 of the Complaint, except admit that the Pension and Profit Sharing Committee was a fiduciary of the Plan as of the filing date of the Complaint. Further answering, Fifth Third Defendants state that the Plan documents speak for themselves.

55. Fifth Third Defendants aver that the allegations contained in Paragraph 55 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself and further deny all remaining allegations contained in Paragraph 55.

56. Fifth Third Defendants aver that the allegations contained in Paragraph 56 are conclusory statements and conclusions of law, and therefore, no response is required. To the extent that a response is

required, Fifth Third Defendants deny each and every allegation contained in Paragraph 56.

57. Fifth Third Defendants state that according to the Pension and Profit Sharing Committee Bylaws, Kevin T. Kabat, President of Fifth Third Bank, appointed the members of the Pension and Profit Sharing Committee and the Board of Directors approved the appointments. Further answering, Fifth Third Defendants state that the duties and actions of the Pension and Profit Sharing Committee are detailed in Pension and Profit Sharing Committee meeting minutes and bylaws. Fifth Third Defendants further state that the Plan documents speak for themselves. Fifth Third Defendants deny all remaining allegations contained in Paragraph 57.

58. Fifth Third Defendants aver that the allegations contained in Paragraph 58 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced stature, in its entirety, speaks for itself.

59. Fifth Third Defendants aver that the allegations contained in Paragraph 59 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself and further deny all remaining allegations contained in Paragraph 59 of the Complaint.

60. Fifth Third Defendants deny each and every allegation contained in Paragraph 60 of the Complaint to the extent they are not consistent with the Trust

Agreement. Further answering, Fifth Third Defendants state that the Trust Agreement speaks for itself.

61. Fifth Third Defendants state that according to the Pension and Profit Sharing Committee Bylaws, Kevin T. Kabat, President of Fifth Third Bank, appointed the members of the Pension and Profit Sharing Committee and the Board of Directors approved the appointments. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 61 of the Complaint.

62. Fifth Third Defendants deny each and every allegation contained in Paragraph 62 of the Complaint.

63. Fifth Third Defendants aver that the allegations contained in Paragraph 63 of the Complaint state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself and further deny all remaining allegations contained in Paragraph 63 of the Complaint.

64. Fifth Third Defendants state that according to the Pension and Profit Sharing Committee Bylaws, Kevin T. Kabat, President of Fifth Third Bank, appointed the members of the Pension and Profit Sharing Committee and the Board of Directors approved the appointments. Further answering, Fifth Third Defendants deny all remaining allegations contained within Paragraph 64 of the Complaint to the extent they are not consistent with the Plan documents or the Organization and Authority of Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee Recitals ("Pension and Profit Sharing Committee

Bylaws"). Fifth Third Defendants further state that the Plan documents and Pension and Profit Sharing Committee Recitals speak for themselves.

65. Fifth Third Defendants deny each and every allegation contained in Paragraph 65 of the Complaint.

66. Fifth Third Defendants admit the allegation contained in Paragraph 66 of the Complaint.

67. Fifth Third Defendants deny each and every allegation contained in Paragraph 67 of the Complaint, except admit that the Pension and Profit Sharing Committee was a fiduciary of the Plan as of the filing date of the Complaint.

68. Fifth Third Defendants deny each and every allegation contained in Paragraph 68 of the Complaint, except admit that the Pension and Profit Sharing Committee was a fiduciary of the Plan as of the filing date of the Complaint.

69. Fifth Third Defendants admit that Fifth Third Bancorp is a diversified financial services holding company. Fifth Third Defendants admit that Fifth Third Bancorp operates four business segments – Commercial Banking, Branch Banking, Consumer Lending and Investment Advisors. Fifth Third Defendants admit that, during part of the time relevant to this action, Fifth Third Bancorp operated a Fifth Third Processing Solutions segment. Fifth Third Defendants admit that, during part of the time relevant to this action, the Consumer Lending segment included mortgage and home equity activities. Fifth Third Defendants admit that, during part of the time relevant to this action, the Commercial Banking segment offered banking, cash management and

financial services to large and middle-market businesses, government and professional customers. Fifth Third Defendants admit that, during part of the time relevant to this action, the Branch Banking segment provided a range of deposit and loans and lease products to individuals and small businesses. Fifth Third Defendants admit that, during part of the time relevant to this action, the Investment Advisors segment provided a range of investment alternatives for individuals, companies and not-for-profit organizations. Fifth Third Defendants admit that, during part of the time relevant to this action, the Fifth Third Processing Solutions segment provided electronic funds transfer, debit, credit and merchant processing services, and other data processing services. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 69 of the Complaint.

70. Fifth Third Defendants admit the allegations contained in Paragraph 70 of the Complaint.

71. Fifth Third Defendants deny each and every allegation contained in Paragraph 71 of the Complaint.

72. Fifth Third Defendants aver that the allegations of Paragraph 72 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 72 of the Complaint, which contains no allegations as to them.

73. Fifth Third Defendants aver that the allegations of Paragraph 73 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 73 of the Complaint, which contains no allegations as to them.

74. Fifth Third Defendants aver that the allegations of Paragraph 74 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 74 of the Complaint.

75. Fifth Third Defendants aver that the allegations of Paragraph 75 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 75 of the Complaint, which contains no allegations as to them.

76. Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations of Paragraph 76 of the Complaint, which contains no allegations as to them.

77. Fifth Third Defendants aver that the allegations of Paragraph 77 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 77 of the Complaint, which contains no allegations as to them.

78. Fifth Third Defendants aver that the allegations of Paragraph 78 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 78 of the Complaint, which contains no allegations as to them.

79. Fifth Third Defendants aver that the allegations of Paragraph 79 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 79 of the Complaint, which contains no allegations as to them.

80. Fifth Third Defendants aver that the allegations of Paragraph 80 of the Complaint contain information from publications, and therefore, no

response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 80 of the Complaint, which contains no allegations as to them.

81. Fifth Third Defendants aver that the allegations of Paragraph 81 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 81 of the Complaint, which contains no allegations as to them.

82. Fifth Third Defendants aver that the allegations of Paragraph 82 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 82 of the Complaint, which contains no allegations as to them.

83. Fifth Third Defendants aver that the allegations of Paragraph 83 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth

Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 83 of the Complaint, which contains no allegations as to them.

84. Fifth Third Defendants aver that the allegations of Paragraph 84 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 84 of the Complaint, which contains no allegations as to them.

85. Fifth Third Defendants aver that the allegations of Paragraph 85 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 85 of the Complaint, which contains no allegations as to them.

86. Fifth Third Defendants aver that the allegations of Paragraph 86 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in

Paragraph 86 of the Complaint, which contains no allegations as to them.

87. Fifth Third Defendants aver that the allegations of Paragraph 87 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 87 of the Complaint, which contains no allegations as to them.

88. Fifth Third Defendants aver that the allegations of Paragraph 88 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 88 of the Complaint, which contains no allegations as to them.

89. Fifth Third Defendants aver that the allegations of Paragraph 89 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 89 of the Complaint, which contains no allegations as to them.

90. Fifth Third Defendants aver that the allegations of Paragraph 90 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 90 of the Complaint, which contains no allegations as to them.

91. Fifth Third Defendants aver that the allegations of Paragraph 91 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 91 of the Complaint, which contains no allegations as to them.

92. Fifth Third Defendants aver that the allegations of Paragraph 92 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 92 of the Complaint, which contains no allegations as to them.

93. Fifth Third Defendants aver that the allegations of Paragraph 93 of the Complaint contain information from publications, and therefore, no

response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 93 of the Complaint, which contains no allegations as to them.

94. Fifth Third Defendants aver that the allegations of Paragraph 94 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 94 of the Complaint, which contains no allegations as to them.

95. Fifth Third Defendants deny each and every allegation contained in Paragraph 95 of the Complaint.

96. Fifth Third Defendants deny each and every allegation contained in Paragraph 96 of the Complaint.

97. Fifth Third Defendants deny each and every allegation contained in Paragraph 97 of the Complaint.

98. Fifth Third Defendants deny each and every allegation contained in Paragraph 98 of the Complaint.

99. Fifth Third Defendants deny each and every allegation contained in Paragraph 99 of the Complaint, except admit that the Plan invested in Fifth Third stock during the Class Period.

100. Fifth Third Defendants deny each and every allegation contained in Paragraph 100 of the Complaint.

101. Fifth Third Defendants aver that the allegations of Paragraph 101 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 101 of the Complaint.

102. Fifth Third Defendants aver that the allegations contained in Paragraph 102 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants deny all remaining allegations contained in Paragraph 102 of the Complaint.

103. Fifth Third Defendants deny each and every allegation contained in Paragraph 103 of the Complaint.

104. Fifth Third Defendants deny each and every allegation contained in Paragraph 104 of the Complaint.

105. Fifth Third Defendants admit the allegations contained in Paragraph 105 of the Complaint.

106. Fifth Third Defendants deny the allegations contained in Paragraph 106 of the Complaint.

107. Fifth Third Defendants deny the allegations contained in Paragraph 107 of the Complaint.

108. Fifth Third Defendants deny the allegations contained in Paragraph 108 of the Complaint.

109. Fifth Third Defendants deny the allegations contained in Paragraph 109 of the Complaint.

110. Fifth Third Defendants deny the allegations contained in Paragraph 110, except admit that the ability of borrowers to pay their mortgages is tied to Fifth Third's loss exposure.

111. Fifth Third Defendants deny the allegations contained in Paragraph 111 of the Complaint.

112. Fifth Third Defendants deny the allegations contained in Paragraph 112 of the Complaint.

113. Fifth Third Defendants admit that on July 19, 2007 Fifth Third issued a press release and filed a Form 8-K with the SEC that speak for themselves, and respectfully refer the Court to the documents for their content.

114. Fifth Third Defendants admit that Fifth Third issued a July 19, 2007 press release that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 114 of the Complaint.

115. Fifth Third Defendants admit that on August 16, 2007 Fifth Third issued a press release and filed a Form 8-K with the SEC that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 115 of the Complaint.

116. Fifth Third Defendants admit that on September 11, 2007 Fifth Third presented at the

Lehman Brothers Financial Services Conference. Further answering, Fifth Third Defendants state that a copy of Fifth Third's presentation at this conference attached as an exhibit to Fifth Third's September 11, 2007 Form 8-K speaks for itself, and deny all remaining allegations of Paragraph 116 of the Complaint.

117. Fifth Third Defendants admit the allegations contained in Paragraph 117 of the Complaint.

118. Fifth Third Defendants admit the allegations contained in Paragraph 118 of the Complaint.

119. Fifth Third Defendants admit that Fifth Third issued an October 19, 2007 press release that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 119 of the Complaint.

120. Fifth Third Defendants admit that Fifth Third issued an October 19, 2007 press release that speaks for itself, and respectfully refer the Court to the document for its content.

121. Fifth Third Defendants admit that Fifth Third issued an October 19, 2007 press release that speaks for itself, and respectfully refer the Court to the document for its content.

122. Fifth Third Defendants admit that Fifth Third issued an October 19, 2007 press release that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 122 of the Complaint.

123. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, and respectfully refer the Court to the document for its content.

124. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 124 of the Complaint.

125. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, and respectfully refer the Court to the document for its content.

126. Fifth Third Defendants deny the allegations contained in Paragraph 126 of the Complaint.

127. Fifth Third Defendants deny the allegations contained in Paragraph 127 of the Complaint.

128. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 128 of the Complaint.

129. Fifth Third Defendants deny the allegations contained in Paragraph 129 of the Complaint.

130. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, and respectfully refer the Court to the document for its content.

131. Fifth Third Defendants deny the allegations contained in Paragraph 131 of the Complaint.

132. Fifth Third Defendants admit that Fifth Third filed a Form 10-Q on November 9, 2007 that speaks for itself, and respectfully refer the Court to the document for its content.

133. Fifth Third Defendants deny the allegations contained in Paragraph 133 of the Complaint.

134. Fifth Third Defendants deny the allegations contained in Paragraph 134 of the Complaint.

135. Fifth Third Defendants admit that on November 14, 2007 Fifth Third presented at the Merrill Lynch 2007 Banking & Financial Services Conference. Further answering, Fifth Third Defendants state that a copy of Fifth Third's presentation at this conference attached as an exhibit to Fifth Third's November 14, 2007 Form 8-K speaks for itself, and deny all remaining allegations of Paragraph 135 of the Complaint.

136. Fifth Third Defendants admit that on November 29, 2007 Fifth Third presented at the Fox-Pitt Kelton Cochran Caronia Waller Financial Services Conference. Further answering, Fifth Third Defendants state that a copy of Fifth Third's presentation at this conference attached as an exhibit to Fifth Third's November 29, 2007 Form 8-K speaks for itself, and deny all remaining allegations of Paragraph 136 of the Complaint.

137. Fifth Third Defendants admit that on January 22, 2008 Fifth Third issued a press release reporting its 2007 earnings that speaks for itself,

respectfully refer the Court to the document for its content, and deny all remaining allegations of Paragraph 137 of the Complaint.

138. Fifth Third Defendants admit that on January 22, 2008 Fifth Third issued a press release and filed a Form 8-K with the SEC that speak for themselves, and respectfully refer the Court to the documents for their content.

139. Fifth Third Defendants deny the allegations contained in Paragraph 139 of the Complaint.

140. Fifth Third Defendants admit that on January 30, 2008 Fifth Third presented at the Citigroup 2008 Financial Services Conference. Further answering, Fifth Third Defendants state the a copy of Fifth Third's presentation at this conference attached as an exhibit to Fifth Third's January 30, 2008 Form 8-K speaks for itself, and deny all remaining allegations of Paragraph 140 of the Complaint.

141. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations of Paragraph 141 of the Complaint.

142. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations of Paragraph 142 of the Complaint.

143. Fifth Third Defendants deny the allegations contained in Paragraph 143 of the Complaint.

144. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations of Paragraph 144 of the Complaint.

145. Fifth Third Defendants deny the allegations contained in Paragraph 145 of the Complaint.

146. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refers the Court to the document for its content, and deny all remaining allegations of Paragraph 146 of the Complaint.

147. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations of Paragraph 147 of the Complaint.

148. Fifth Third Defendants deny the allegations contained in Paragraph 148 of the Complaint.

149. Fifth Third Defendants admit that Fifth Third filed its 2007 10-K Annual Report in February, 2008 that speaks for itself, respectfully refers the Court to the document for its content, and deny all remaining allegations of Paragraph 149 of the Complaint.

150. Fifth Third Defendants deny the allegations contained in Paragraph 150 of the Complaint.

151. Fifth Third Defendants aver that the allegations of Paragraph 151 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is

required, Fifth Third Defendants state that the publication speaks for itself.

152. Fifth Third Defendants deny the allegations contained in Paragraph 152 of the Complaint.

153. Fifth Third Defendants admit the allegations contained in Paragraph 153 of the Complaint.

154. Fifth Third Defendants admit that Fifth Third filed a Form 8-K dated April 22, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 154 of the Complaint.

155. Fifth Third Defendants deny the allegations contained in Paragraph 155 of the Complaint.

156. Fifth Third Defendants deny the allegations contained in Paragraph 156 of the Complaint.

157. Fifth Third Defendants deny the allegations contained in Paragraph 157 of the Complaint.

158. Fifth Third Defendants admit that Fifth Third issued a press release titled "Fifth Third to Strengthen Capital Position" on June 18, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 158 of the Complaint.

159. Fifth Third Defendants admit the allegations contained in Paragraph 159 of the Complaint.

160. Fifth Third Defendants aver that the allegations of Paragraph 160 of the Complaint contain

information from publications that speak for themselves, and deny all remaining allegations contained in Paragraph 160 of the Complaint.

161. Fifth Third Defendants aver that the allegations of Paragraph 161 of the Complaint contain information from publications that speak for themselves, and deny all remaining allegations contained in Paragraph 161 of the Complaint.

162. Fifth Third Defendants admit that in June 2008 Fifth Third launched a program entitled "You Have Options." Further answering, Fifth Third Defendants admit that in early June 2008 Fifth Third announced the completion of its acquisition of First Charter Corporation. Fifth Third Defendants deny all remaining allegations contained in Paragraph 162 of the Complaint.

163. Fifth Third Defendants deny the allegations contained in Paragraph 163 of the Complaint.

164. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 164 of the Complaint.

165. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 165 of the Complaint.

166. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 166 of the Complaint related to these documents. Fifth Third Defendants further aver that the remaining allegations of Paragraph 166 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the remaining allegations from publications contained in Paragraph 166 of the Complaint, and therefore deny same.

167. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 167 of the Complaint.

168. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 168 of the Complaint.

169. Fifth Third Defendants aver that the allegations of Paragraph 169 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the

publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 169 of the Complaint, which contains no allegations as to them.

170. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 170 of the Complaint.

171. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 171 of the Complaint.

172. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 172 of the Complaint.

173. Fifth Third Defendants admit that on June 18, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 173 of the Complaint.

174. Fifth Third Defendants admit that Fifth Third stock closed at $12.73 on June 17, 2008 and $9.26 on June 18, 2008. Fifth Third Defendants deny

all remaining allegations contained in Paragraph 174 of the Complaint.

175. Fifth Third Defendants admit that on July 22, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 175 of the Complaint.

176. Fifth Third Defendants admit that on October 21, 2008, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 176 of the Complaint related to these documents. Further answering, Fifth Third Defendants deny the characterization of the partial statement Plaintiffs attribute to Kevin T. Kabat set forth in Paragraph 176 of the Complaint, as it is incomplete and thus inaccurate. Fifth Third Defendants deny all remaining allegations of Paragraph 176 of the Complaint.

177. Fifth Third Defendants admit that on January 22, 2009, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 177 of the Complain related to these documents. Fifth Third Defendants admit that Fifth Third stock closed at $3.99 per share on January 21, 2009 and $2.85 per share on January 22, 2009. Fifth Third Defendants deny all remaining allegations of Paragraph 177 of the Complaint.

178. Fifth Third Defendants admit that the U.S. government purchased $3.4 billion in shares of preferred stock and Fifth Third subsequently repurchased all $3.4 billion in shares of preferred stock. Fifth Third Defendants aver that the remaining allegations of Paragraph 178 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 178 of the Complaint, which contains no remaining allegations as to them.

179. Fifth Third Defendants admit that on January 22, 2009, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 179 of the Complaint.

180. Fifth Third Defendants aver that the allegations of Paragraph 180 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations from publications contained in Paragraph 180 of the Complaint, and deny the allegations from publications of Paragraph 180 of the Complaint.

181. Fifth Third Defendants aver that the allegations of Paragraph 181 of the Complaint contain

information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations from publications contained in Paragraph 181 of the Complaint, and therefore deny same.

182. Fifth Third Defendants aver that the allegations of Paragraph 182 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations from publications contained in Paragraph 182 of the Complaint, and therefore deny same.

183. Fifth Third Defendants admit that on March 30, 2009, Fifth Third issued a press release and filed a Form 8-K that speak for themselves, respectfully refer the Court to the documents for their content, and deny all remaining allegations contained in Paragraph 183 of the Complaint.

184. Fifth Third Defendants aver that the allegations of Paragraph 184 of the Complaint contain information from publications, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the publication speaks for itself. Further answering, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations from

publications contained in Paragraph 184 of the Complaint, and therefore deny same.

185. Fifth Third Defendants deny the allegations contained in Paragraph 185 of the Complaint.

186. Fifth Third Defendants deny the allegations contained in Paragraph 186 of the Complaint.

187. Fifth Third Defendants deny the allegations contained in Paragraph 187 of the Complaint.

188. Fifth Third Defendants deny the allegations contained in Paragraph 188 of the Complaint.

189. Fifth Third Defendants deny the allegations contained in Paragraph 189 of the Complaint.

190. Fifth Third Defendants deny the allegations contained in Paragraph 190 of the Complaint.

191. Fifth Third Defendants deny the allegations contained in Paragraph 191 of the Complaint.

192. Fifth Third Defendants deny the allegations contained in Paragraph 192 of the Complaint.

193. Fifth Third Defendants deny the allegations contained in Paragraph 193 of the Complaint.

194. Fifth Third Defendants deny the allegations contained in Paragraph 194 of the Complaint.

195. Fifth Third Defendants deny the allegations contained in Paragraph 195 of the Complaint.

196. Fifth Third Defendants deny the allegations contained in Paragraph 196 of the Complaint.

197. Fifth Third Defendants deny the allegations contained in Paragraph 197 of the Complaint.

198. Fifth Third Defendants deny the allegations contained in Paragraph 198 of the Complaint.

199. Fifth Third Defendants deny the allegations contained in Paragraph 199 of the Complaint.

200. Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 200 of the Complaint, which contains no allegations as to them.

201. Fifth Third Defendants admit that on March 10, 2009 Fifth Third filed a Proxy Statement that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 201 of the Complaint.

202. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 10, 2009 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 202 of the Complaint.

203. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 10, 2009 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 203 of the Complaint.

204. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 10, 2009

that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 204 of the Complaint.

205. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 10, 2009 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 205 of the Complaint.

206. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 6, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 206 of the Complaint.

207. Fifth Third Defendants admit that Fifth Third filed a Proxy Statement dated March 6, 2008 that speaks for itself, respectfully refer the Court to the document for its content, and deny all remaining allegations contained in Paragraph 207 of the Complaint.

208. Fifth Third Defendants deny the allegations contained in Paragraph 208 of the Complaint.

209. Fifth Third Defendants deny the allegations contained in Paragraph 209 of the Complaint.

210. Fifth Third Defendants deny the allegations contained in Paragraph 210 of the Complaint.

211. Fifth Third Defendants deny the allegations contained in Paragraph 211 of the Complaint.

212. Fifth Third Defendants deny the allegations contained in Paragraph 212 of the Complaint.

213. Fifth Third Defendants deny the allegations contained in Paragraph 213 of the Complaint.

214. Fifth Third Defendants aver that the allegations contained in Paragraph 214 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

215. Fifth Third Defendants aver that the allegations contained in Paragraph 215 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

216. Fifth Third Defendants aver that the allegations contained in Paragraph 216 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and that ERISA fiduciary duties do not apply when a fiduciary is acting in a non-fiduciary capacity.

217. Fifth Third Defendants aver that the allegations contained in Paragraph 217 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

218. Fifth Third Defendants aver that the allegations contained in Paragraph 218 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

219. Fifth Third Defendants aver that the allegations contained in Paragraph 219 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 219 of the Complaint, which contains no allegations as to them.

220. Fifth Third Defendants aver that the allegations contained in Paragraph 220 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 220 of the Complaint, which contains no allegations as to them.

221. Fifth Third Defendants aver that the allegations contained in Paragraph 221 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 221 of the Complaint, which contains no allegations as to them.

222. Fifth Third Defendants aver that the allegations contained in Paragraph 222 state

conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

223. Fifth Third Defendants aver that the allegations contained in Paragraph 223 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 223 of the Complaint, which contains no allegations as to them.

224. Fifth Third Defendants aver that the allegations contained in Paragraph 224 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all remaining allegations contained in Paragraph 224 of the Complaint.

225. Fifth Third Defendants repeat and incorporate by reference the answers set forth in Paragraphs 1-224 as if fully set forth herein.

226. Fifth Third Defendants aver that Paragraph 226 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required.

227. Fifth Third Defendants deny the allegations contained in Paragraph 227 of the Complaint.

228. Fifth Third Defendants aver that the allegations contained in Paragraph 228 state

conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the duties and actions of the Pension and Profit Sharing Committee are detailed in Fifth Third Pension and Profit Sharing Committee meeting minutes and bylaws. Fifth Third Defendants deny all remaining allegations contained in Paragraph 228.

229. Fifth Third Defendants deny the allegations contained in Paragraph 229 of the Complaint.

230. Fifth Third Defendants aver that the allegations contained in Paragraph 230 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the duties and actions of the Pension and Profit Sharing Committee are detailed in Fifth Third Pension and Profit Sharing Committee meeting minutes and bylaws. Fifth Third Defendants deny all remaining allegations contained in Paragraph 230.

231. Fifth Third Defendants deny the allegations contained in Paragraph 231 of the Complaint.

232. Fifth Third Defendants deny the allegations contained in Paragraph 232 of the Complaint.

233. Fifth Third Defendants aver that the allegations contained in Paragraph 233 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all remaining allegations contained in Paragraph 233 of the Complaint.

234. Fifth Third Defendants aver that the allegations contained in Paragraph 234 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 234 of the Complaint, which contains no allegations as to them.

235. Fifth Third Defendants aver that the allegations contained in Paragraph 235 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 235 of the Complaint, which contains no allegations as to them.

236. Fifth Third Defendants deny the allegations contained in Paragraph 236 of the Complaint.

237. Fifth Third Defendants deny the allegations contained in Paragraph 237 of the Complaint.

238. Fifth Third Defendants deny the allegations contained in Paragraph 238 of the Complaint.

239. Fifth Third Defendants deny the allegations contained in Paragraph 239 of the Complaint.

240. Fifth Third Defendants state that ERISA specifically provides that the duty of diversification does not apply to eligible individual account plans (including ESOPs) and that the prudency standard does not apply to the extent it would require diversification. ERISA § 404(a)(2). Further answering,

Fifth Third Defendants deny all remaining allegations contained in Paragraph 240 of the Complaint.

241. Fifth Third Defendants aver that the allegations contained in Paragraph 241 state conclusions of law to which no response is required. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 241 of the Complaint.

242. Fifth Third Defendants deny the allegations contained in Paragraph 242 of the Complaint.

243. Fifth Third Defendants aver that the allegations contained in Paragraph 243 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 243 of the Complaint, which contains no allegations as to them.

244. Fifth Third Defendants deny the allegations contained in Paragraph 244 of the Complaint.

245. Fifth Third Defendants deny the allegations contained in Paragraph 245 of the Complaint.

246. Fifth Third Defendants deny the allegations contained in Paragraph 246 of the Complaint.

247. Fifth Third Defendants deny the allegations contained in Paragraph 247 of the Complaint.

248. Fifth Third Defendants deny the allegations contained in Paragraph 248 of the Complaint.

249. Fifth Third Defendants repeat and incorporate by reference the answers set forth in paragraphs 1 through 248 as if fully set forth herein.

250. Fifth Third Defendants aver that Paragraph 250 of the Complaint contains characterizations of the allegations of the Complaint to which no response is required.

251. Fifth Third Defendants deny the allegations contained in Paragraph 251 of the Complaint.

252. Fifth Third Defendants state that, according to the Pension and Profit Sharing Committee Bylaws, Kevin T. Kabat, President of Fifth Third Bank, appointed the members of the Pension and Profit Sharing Committee and the Board of Directors approved the appointments. Fifth Third Defendants further state that the duties and actions of the Pension and Profit Sharing Committee are detailed in Fifth Third Pension and Profit Sharing Committee meeting minutes and bylaws. Further answering, Fifth Third Defendants deny all remaining allegations contained in Paragraph 252 of the Complaint.

253. Fifth Third Defendants state that, according to the Pension and Profit Sharing Committee Bylaws, Kevin T. Kabat, President of Fifth Third Bank, appointed the members of the Pension and Profit Sharing Committee and the Board of Directors approved the appointments. Fifth Third Defendants further state that the duties and actions of the Pension and Profit Sharing Committee are detailed in Fifth Third Pension and Profit Sharing Committee meeting minutes and bylaws. Further answering, Fifth Third

Defendants deny all remaining allegations contained in Paragraph 253 of the Complaint.

254. Fifth Third Defendants aver that the allegations contained in Paragraph 254 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 254 of the Complaint, which contains no allegations as to them.

255. Fifth Third Defendants aver that the allegations contained in Paragraph 255 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 255 of the Complaint, which contains no allegations as to them.

256. Fifth Third Defendants aver that the allegations contained in Paragraph 256 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants lack knowledge sufficient to form a belief about the truth of the allegations contained in Paragraph 256 of the Complaint, which contains no allegations as to them.

257. Fifth Third Defendants deny the allegations contained in Paragraph 257 of the Complaint.

258. Fifth Third Defendants deny the allegations contained in Paragraph 258 of the Complaint.

259. Fifth Third Defendants deny the allegations contained in Paragraph 259 of the Complaint.

260. Fifth Third Defendants deny the allegations contained in Paragraph 260 of the Complaint.

261. Fifth Third Defendants repeat and incorporate by reference the answers set forth in Paragraphs 1-260 as if fully set forth herein.

262. Fifth Third Defendants deny the allegations contained in Paragraph 262 of the Complaint.

263. Fifth Third Defendants aver that the allegations contained in Paragraph 263 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

264. Fifth Third Defendants deny the allegations contained in Paragraph 264 of the Complaint.

265. Fifth Third Defendants deny the allegations contained in Paragraph 265 of the Complaint.

266. Fifth Third Defendants deny the allegations contained in Paragraph 266 of the Complaint.

267. Fifth Third Defendants deny the allegations contained in Paragraph 267 of the Complaint.

268. Fifth Third Defendants repeat and incorporate by reference the responses set forth in Paragraphs 1 through 267 of the Complaint.

269. Fifth Third Defendants aver that Paragraph 269 of the Complaint contains characterizations of the

allegations of the Complaint to which no response is required.

270. Fifth Third Defendants deny the allegations contained in Paragraph 270 of the Complaint.

271. Fifth Third Defendants aver that the allegations contained in Paragraph 271 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all remaining allegations contained in Paragraph 271 of the Complaint.

272. Fifth Third Defendants aver that the allegations contained in Paragraph 272 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all remaining allegations contained in Paragraph 272 of the Complaint.

273. Fifth Third Defendants deny the allegations contained in Paragraph 273 of the Complaint.

274. Fifth Third Defendants deny the allegations contained in Paragraph 274 of the Complaint.

275. Fifth Third Defendants aver that the allegations contained in Paragraph 275 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all

remaining allegations contained in Paragraph 275 of the Complaint.

276. Fifth Third Defendants aver that the allegations contained in Paragraph 276 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself.

277. Fifth Third Defendants deny the allegations contained in Paragraph 277 of the Complaint.

278. Fifth Third Defendants deny the allegations contained in Paragraph 278 of the Complaint.

279. Fifth Third Defendants deny the allegations contained in Paragraph 279 of the Complaint.

280. Fifth Third Defendants deny the allegations contained in Paragraph 280 of the Complaint.

281. Fifth Third Defendants deny the allegations contained in Paragraph 281 of the Complaint.

282. Fifth Third Defendants deny the allegations contained in Paragraph 282 of the Complaint.

283. Fifth Third Defendants deny the allegations contained in Paragraph 283 of the Complaint.

284. Fifth Third Defendants aver that the allegations contained in Paragraph 284 state conclusions of law, and therefore, no response is required. To the extent that a response is required, Fifth Third Defendants state that the referenced statute, in its entirety, speaks for itself, and deny all

remaining allegations contained in Paragraph 284 of the Complaint.

285. Fifth Third Defendants deny the allegations contained in Paragraph 285 of the Complaint.

286. Fifth Third Defendants deny the allegations contained in Paragraph 286 of the Complaint.

287. Fifth Third Defendants deny the allegations contained in Paragraph 287 of the Complaint.

PRAYER FOR RELIEF

With respect to Plaintiffs' prayer for relief, Fifth Third Defendants deny that Plaintiffs are entitled to any relief against Fifth Third Defendants in this action.

AFFIRMATIVE AND OTHER DEFENSES

In asserting the following affirmative and other defenses to Plaintiffs' claims, Fifth Third Defendants do not concede that the assertion of such defenses imposes any burden of proof on Fifth Third Defendants with respect thereto.

FIRST DEFENSE

This action is barred, in whole or in part, because the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This action is barred, in whole or in part, because Plaintiffs lack standing to assert the claims alleged in this action.

THIRD DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs' allegations do not satisfy any of the requirements of Rule 23 of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, by the doctrines of estoppel, waiver and/or ratification.

FIFTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because Fifth Third Defendants were not functioning in a fiduciary capacity when they engaged in the conduct that is the subject of this Complaint.

SIXTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because Fifth Third Defendants did not breach any fiduciary duty they may have owed to Plaintiffs.

SEVENTH DEFENSE

Plaintiffs' monitoring claims asserted in the Complaint against Defendants Fifth Third and Kevin T. Kabat are barred, in whole or in part, because these Defendants did not owe or breach a duty to monitor persons appointed to make decisions about the Plan.

EIGHTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred to the extent that they rely upon allegations of co-fiduciary liability because, if a co-fiduciary breached a duty, which Fifth Third Defendants deny, Fifth Third Defendants did not know of such breach, assist in such breach, conceal such breach, or otherwise fail to protect the interests of Plaintiffs.

NINTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because Plaintiffs have failed to rebut the presumption of reasonableness regarding investments in company stock.

TENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because Fifth Third Defendants did not make any misrepresentations or omissions of material fact, and are not responsible in law or in fact for any alleged misrepresentation or omission of material fact made by others.

ELEVENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Fifth Third Defendants did not know, and in the exercise of reasonable care could not have known, of the existence of the alleged false or misleading statements and/or omissions of material fact asserted in the Complaint.

TWELFTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Fifth Third Defendants were entitled to, and did reasonably and in good faith, rely upon the work and conclusions of professionals and experts in executing or authorizing the execution and/or publication of any document containing statements complained of in the Complaint.

THIRTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because the alleged misrepresentations and/or omissions upon which Plaintiffs base such claims were not material.

FOURTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because Plaintiffs have failed to demonstrate actual, direct, or individual reliance upon the alleged misrepresentations and/or omissions.

FIFTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because the alleged misrepresentations and/or omissions neither caused nor were a material causal factor in Plaintiffs' investment decisions in the action or any alleged losses.

SIXTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs have failed to allege, and have not suffered, any cognizable injury attributable,

in whole or in part, to any acts or omissions of Fifth Third Defendants. Plaintiffs' damages, if any, resulted from the acts or omissions of Plaintiffs and/or others and not from any acts or omissions by Fifth Third Defendants.

SEVENTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs are only entitled to a single recovery and have not suffered any cognizable injury and/or damages apart from, or in addition to, the injuries and/or damages sought in the parallel federal securities consolidated class action case entitled *Local 295 / Local 851 IBT Employer Group Pension Trust and Welfare Funds and District No. 9 v. Fifth Third Bancorp, et al.*, Case No.1:08cv421.

EIGHTEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs assumed the risk of losses on the transactions at issue in this action.

NINETEENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs failed to exercise due diligence.

TWENTIETH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs failed to use reasonable care to prevent or minimize any alleged damages.

TWENTY-FIRST DEFENSE

Plaintiffs' claims asserted in the Complaint are barred by the applicable statute or statutes of limitation and/or repose.

TWENTY-SECOND DEFENSE

Plaintiffs' claims asserted in the Complaint for injunctive and/or equitable relief are barred, in whole or in part, by the doctrine of mootness.

TWENTY-THIRD DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, by the doctrines of collateral estoppel, release and/or merger.

TWENTY-FOURTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs' allegations fail to demonstrate loss causation.

TWENTY-FIFTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, by § 404(a)(2) of ERISA, 29 U.S.C. § 1104(a)(2).

TWENTY-SIXTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because the Plan satisfies the requirements of an ESOP and is therefore exempt from the duty of diversification.

TWENTY- SEVENTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, because the relief sought by Plaintiffs would not go to the Plan, as required by ERISA, but would instead provide only individualized relief for a fraction of the Plan's participants.

TWENTY-EIGHTH DEFENSE

Plaintiffs' claims asserted in the Complaint are barred because Plaintiffs failed to exhaust administrative remedies.

TWENTY-NINTH DEFENSE

Plaintiffs' Complaint is barred, in whole or in part, because the relief sought is not appropriate equitable relief.

THIRTIETH DEFENSE

Plaintiffs have not relied upon any information that Fifth Third Defendants allegedly failed to disclose.

THIRTY-FIRST DEFENSE

Plaintiffs suffered no damages as a result of the Fifth Third Defendants' alleged breaches of fiduciary duty.

THIRTY-SECOND DEFENSE

The Fifth Third Defendants prudently relied upon their investment managers pursuant to ERISA §§ 405(c)(2) & (3).

THIRTY-THIRD DEFENSE

Plaintiffs' claims asserted in the Complaint are barred, in whole or in part, by the doctrine of mistake.

THIRTY- FOURTH DEFENSE

This action is barred, in whole or in part, because some or all of the alleged public disclosures bespoke caution or were forward-looking statements.

THIRTY-FIFTH DEFENSE

This action is barred, in whole or in part, because Plaintiffs have failed to mitigate damages and have failed to exercise due diligence in an effort to mitigate their damages (to which, in any event, they are not entitled).

THIRTY-SIXTH DEFENSE

This action is barred, in whole or in part, because it fails to allege any actionable misstatement or misrepresentation by Fifth Third Defendants.

THIRTY-SEVENTH DEFENSE

This action is barred, in whole or in part, because Fifth Third Defendants justifiably relied on information provided to them by others.

THIRTY-EIGHTH DEFENSE

Fifth Third Defendants deny that Plaintiffs are entitled to recovery of their attorneys' fees.

THIRTY-NINTH DEFENSE

This action is barred, in whole or in part, because Fifth Third Defendants did not misrepresent any

alleged fact or omit any alleged fact that they were under a duty to disclose.

FORTIETH DEFENSE

This action is barred, in whole or in part, because Fifth Third Defendants neither owed nor breached any duty to Plaintiffs or the class to disclose information allegedly omitted, and had no duty to verify, opine upon, audit, review or correct such information that they disclosed.

FORTY- FIRST DEFENSE

The action is barred, in whole or in part, because the putative class period is overbroad and, therefore, many of the putative class members are not entitled to any recovery.

FORTY-SECOND DEFENSE

This action is barred, in whole or in part, because the fraud-on-the-market theory is not a basis of liability with respect to one or more of the claims alleged in this action.

FORTY-THIRD DEFENSE

This action is barred, in whole or in part, because Plaintiffs' injuries or damages (which are denied), to the extent they exist, were caused by supervening events, including macroeconomic and mortgage-industry events that constrained the credit and capital markets.

FORTY-FORTH DEFENSE

This action is barred, in whole or in part, because at all relevant times Fifth Third Defendants had no duty to disclose the allegedly omitted information.

FORTY-FIFTH DEFENSE

This action is barred, in whole or in part, because Plaintiffs' and the putative class members' claims are barred by the doctrine of laches.

FORTY-SIXTH DEFENSE

This action is barred, in whole or in part, because any information that Fifth Third Defendants allegedly had a duty to disclose, was in fact disclosed.

FORTY-SEVENTH DEFENSE

This action is barred, in whole or in part, because in connection with the making of any statements to any purchasers of the securities of Fifth Third or any affiliate or related entity, Fifth Third Defendants exercised reasonable diligence and/or reasonably relied on information provided to them by Fifth Third's professional advisors and experts, and reasonably and in good faith believed such statements to be materially accurate and not misleadingly incomplete.

FORTY-EIGHTH DEFENSE

Plaintiffs' claims against Fifth Third Defendants are barred in whole, or in part, because the depreciation in the market price of the securities resulted from factors other than the purported misstatements or omissions alleged in the Complaint.

FORTY-NINTH DEFENSE

This action is barred, in whole or in part, because Fifth Third Defendants at no time were aware of facts indicating the probability that statements being made by Fifth Third to the investing public were materially incorrect or misleadingly incomplete.

FIFTIETH DEFENSE

This action is barred, in whole or in part, because any recovery by Plaintiffs would constitute unjust enrichment.

FIFTY-FIRST DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrines of waiver, consent, unclean hands, *in pari delicto*, preclusion and estoppel.

FIFTY-SECOND DEFENSE

Answers to each paragraph of the Complaint are made by Fifth Third Defendants without waiving, and expressly reserving, all rights that Fifth Third Defendants may have to seek relief by appropriate motions directed to the allegations in the Complaint.

FIFTY-THIRD DEFENSE

Fifth Third Defendants reserve the right to assert other defenses, cross-claims, and third-party claims if and when they become appropriate in this action.

WHEREFORE, Fifth Third Defendants seek judgment:

A. dismissing with prejudice all claims asserted in the Complaint;

B. awarding costs of defending this action, including reasonable attorneys' fees, costs and disbursements; and

C. granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

s/ James E. Burke
James E. Burke (0032731)
Joseph M. Callow, Jr. (0061814)
Danielle M. D'Addesa (0076513)
David T. Bules (0083834)
Keating Muething & Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6419
Fax: (513) 579-6457
jburke@kmklaw.com
jcallow@kmklaw.com
ddaddesa@kmklaw.com
dbules@kmklaw.com

Attorneys for Fifth Third Defendants

[*Certificate of Service Omitted in Printing of this Joint Appendix*]

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 2 7 2014
OFFICE OF THE CLERK

No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' BRIEF ON THE MERITS

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Robert A. Long, Jr.
John M. Vine
David M. Zionts
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTION PRESENTED

Whether the Sixth Circuit erred by holding that plaintiffs were not required to plausibly allege in their complaint that the fiduciaries of an ESOP abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), and every other circuit to address the issue.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners (Defendants/Appellees below) are Fifth Third Bancorp, Kevin T. Kabat, Members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee (who include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan and Mary Tuuk). Respondents (Plaintiffs/Appellants below) are John Dudenhoeffer and Alireza Partovipanah.

Fifth Third Bancorp is a publicly traded company and has no parent company. No publicly traded corporation owns 10% or more of its stock.

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OTHER AUTHORITIES

1 Fed. Proc., Lawyers' Ed. 48

4 A. Scott, W. Fratcher & M. Ascher, Scott and Ascher on Trusts (5th ed. 2007) 32

2 McCormick on Evidence 46, 48, 49

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George Gleason Bogert et al., Law of Trusts and Trustees 31

H.R. Rep. No. 93-807 (1974) 3, 39

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H.R. Rep. No. 93-779 (1974) 39

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Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the Subcomm. on Gen. Labor of the House Comm. on Ed. & Labor, 91st Cong. 1st & 2d Sess. (Apr. 16, 1970) 26, 31

Historical Prices for Fifth Third Bancorp (FITB) Stock, Wall St. J., http://quotes.wsj.com/FITB/historical-prices (last visited Jan. 24, 2014) . . . 12

John H. Langbein & Richard A. Posner, Trust-Investment Law: II, 1977 Am. B. Found. Res. J. 1 32

Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L. Rev. 195 (1953) 46, 48

President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans (1965) 36

Restatement (Second) of Trusts 8, 32, 43

Restatement (Third) of Trusts. 31, 32

S. Rep. No. 93-383 (1973) 39

S. Rep. No. 93-127 (1973) 39

Senate Special Committee on Aging, Developments in Aging: 1989, S. Rep. No. 101-249 (1990) ... 27

Staff of S. Committee on Finance, Employee Stock Ownership Plans, 96th Cong., 2d Sess. (Comm. Print 1980) 27

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 692 F.3d 410, and reproduced at Pet. App. 1-27. The order denying the petition for rehearing and rehearing *en banc* is not reported, but reproduced at Pet. App. 55-56. The opinion of the district court is reported at 757 F. Supp. 2d 753, and reproduced at Pet. App. 28-54.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment and opinion on September 5, 2012, and denied rehearing and rehearing en banc on October 12, 2012. The court of appeals had jurisdiction under 28 U.S.C. § 1291. Petitioners timely filed a petition for a writ of certiorari on December 14, 2012, which this Court granted limited to Question 1 on December 13, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant excerpts of 29 U.S.C. §§ 1104, 1106, 1107, and 1108, as well as section 803 of the Tax Reform Act of 1976, Pub. L. No. 94-455, are reproduced in a Statutory Appendix to this Brief. 29 U.S.C. §§ 1104-08 are also reproduced in full in the Appendix accompanying the Petition for a Writ of Certiorari at Pet. App. 57-114.

STATEMENT OF THE CASE

1. ERISA. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), governs employee benefit plans, including pension plans. ERISA recognizes two categories of

pension plans: individual account plans (also known as defined contribution plans) and defined benefit plans. In an individual account plan, a participating employee's benefit is based on the value of the portion of the plan's assets that is allocated to an individual bookkeeping account maintained for that employee. Each participating employee's account is credited with the employee's share of the employee and employer contributions to the plan. The employee's account balance is adjusted upward or downward to reflect the employee's share of the plan's investment gains or losses. *See* 29 U.S.C. § 1002(34).

Participants in individual account plans are not assured a fixed benefit at retirement. Instead, their benefits depend on the plan's investment performance. In contrast, defined benefit plans provide a guaranteed benefit payable at retirement age. Participants in defined benefit plans generally are not exposed to the risk of negative investment experience, but they also have no opportunity to benefit if the plan experiences investment gains. *See* 29 U.S.C. § 1002(34), (35); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n. 1 (2008); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999).

Most private sector retirement plans are individual account plans with cash or deferred arrangements, commonly referred to as "401(k) plans." *See* 26 U.S.C. § 401(k); U.S. Dep't of Labor, Employee Benefits Security Admin., Private Pension Plan Bulletin Historical Tables and Graphs, at 1, 31 (2013). Many of these plans allow each participant to allocate the participant's account balance among several designated investment options. This feature allows each

participant to create an investment portfolio under the plan that has risk and return characteristics that the participant considers appropriate for his or her individual circumstances.

ERISA neither requires employers to maintain pension plans for their employees nor specifies the benefits a plan must provide. Instead, ERISA seeks to encourage employers to maintain benefit plans for their employees on a voluntary basis. Accordingly, Congress sought to strike a balance "between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation and internal quotation marks omitted). *See also* H.R. Rep. No. 93-807, at 2 (1974) ("[P]rivate retirement plans are voluntary on the part of employers, and, therefore, [the committee] has weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits.").

ERISA protects pension and other benefits by subjecting the management and administration of employee benefit plans to fiduciary standards, including a duty of prudence and a duty of loyalty. The duty of prudence requires plan fiduciaries to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The duty of loyalty requires a fiduciary to discharge the fiduciary's duties under the

plan solely in the interest of plan participants. 29 U.S.C. § 1104(a)(1)(A).

The general framework of ERISA's fiduciary standards is derived from the common law of trusts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). "Congress expect[ed]," however, "that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (internal quotation marks and citations omitted) (alteration in original).

2. EIAPs and ESOPs. In ERISA and subsequent legislation, Congress encouraged employers to offer employer stock as an investment or investment option in their individual account plans. ERISA exempts employer stock funds from requirements that would otherwise hamper their operation. Specifically, ERISA exempts "eligible individual account plans" ("EIAPs")[1] from the generally applicable requirement that fiduciaries "diversify[ ] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C); *id.* § 1104(a)(2). ERISA also exempts EIAPs from the generally applicable 10% limit on the portion of plan assets that may be invested in employer securities and employer real property. 29 U.S.C. § 1107(a), (b).

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[1] In general terms, an EIAP is an individual account plan that "explicitly provides for acquisition and holding of qualifying employer securities . . . ." 29 U.S.C. § 1107(d)(3).

An "employee stock ownership plan" ("ESOP") is a type of EIAP that is defined as (i) a tax-qualified stock bonus plan (or a stock bonus plan and a money purchase plan, both of which are tax-qualified), which (ii) "is designed to invest primarily in qualifying employer securities," and (iii) meets any requirements prescribed by the Secretary of the Treasury by regulation. 29 U.S.C. § 1107(d)(3)(A) & (d)(6). The pertinent Treasury regulation provides that an ESOP must be formally designated as such in the plan document; that an ESOP may form part of a plan that is not an ESOP; and that the plan must specifically state that it is designed to invest primarily in qualifying employer securities. *See* 26 C.F.R. § 54.4975-11(a)(1), (2), & (5); *see also* 29 C.F.R. § 2550.407d-6(a)(2) ("To be an ESOP, a plan must be formally designated as such in the plan document."); *id.* § 2550.407d-6(b) ("A plan constitutes an ESOP only if the plan specifically states that it is designed to invest primarily in qualifying employer securities.").

Although ERISA prohibits most transactions between a plan and the sponsoring employer, 29 U.S.C. §§ 1002(14)(C), 1106(a)(1), ERISA provides an exemption for purchases and sales of employer securities, 29 U.S.C. § 1108(e), and permits an ESOP to borrow from the employer in order to invest in employer stock, 29 U.S.C. § 1108(b)(3).

The Internal Revenue Code offers tax incentives for employers to maintain plans that invest in employer stock. *See* 26 U.S.C. § 404(k) (deductible dividends on employer stock held by ESOP); *id.* § 402(e)(4) (preferential tax treatment for distributions of

appreciated employer stock); *id.* § 1042 (deferring tax on gain from sale of employer stock to ESOP).[2]

In the Tax Reform Act of 1976, Congress emphasized its intent in ERISA and other laws to "encourag[e] employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system" and "bringing about stock ownership by all corporate employees." Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (codified at 26 U.S.C. § 4975 note). Congress was "deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trust and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans." *Id.*; *see also Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003) ("Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and by waiving the duty ordinarily imposed on trustees by modern trust law (including ERISA) to diversify the assets of a pension plan" (internal citations omitted)); *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983) ("Congress has repeatedly

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[2] Congress has at times offered additional incentives, including tax credits for contributions to an ESOP, *e.g.*, Tax Reduction Act of 1975, Pub. L. No. 94-12, § 301; Tax Reform Act of 1976, Pub. L. No. 94-455, § 803; Revenue Act of 1978, Pub. L. No. 95-600, § 141, and an exclusion from a lender's taxable income of 50% of the interest received on a qualifying loan to finance an ESOP's acquisition of employer securities, *see* 26 U.S.C. § 133 (repealed).

expressed its intent to encourage the formation of ESOPs by passing legislation granting such plans favorable treatment, and has warned against judicial and administrative action that would thwart that goal.").

Consistent with these principles, a Third Circuit decision that has been followed by other courts of appeals explained that ESOPs, unlike ordinary retirement plans, are not intended to guarantee retirement benefits because their very nature "places employee retirement assets at much greater risk than does the typical diversified ERISA plan." *See Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) (quoting *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992)). EIAP fiduciaries (including ESOP fiduciaries) are exempt from the duty to diversify investments "so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C), (a)(2). The ESOP "serves a purpose expressly approved and encouraged by Congress," and therefore "as a general matter, 'ESOP fiduciaries should not be subjected to breach-of-duty liability for investing plan assets in the manner and for the . . . purposes that Congress intended.'" *Moench*, 62 F.3d at 571 (quoting *Martin*, 965 F.2d at 670).

Moench explained that a non-deferential standard of review of an ESOP fiduciary's decision to invest or remain invested in employer stock would render "meaningless the ERISA provision excepting ESOPs from the duty to diversify." 62 F.3d at 570. Such a standard "would risk transforming ESOPs into ordinary pension benefit plans, which then would frustrate Congress' desire to encourage employee ownership." *Id.* Instead, an ESOP is like a "trust

under which the trustee is directed to invest the assets primarily in the stock of a single company"; in these circumstances, "basic principles of trust law require that the interpretation of the terms of the trust be controlled by the settlor's intent." *Id.* at 570-71.

> [K]eeping in mind the purpose behind ERISA and the nature of ESOPs themselves, . . . an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision.

Id. at 571.

Drawing on trust law, *Moench* explained that, in light of this presumption of prudence, "the most logical result is that the fiduciary's decision to continue investing in employer securities should be reviewed for an abuse of discretion." *Id.* Under this deferential standard, a plaintiff can overcome the presumption of prudence by showing that "owing to circumstances not known to the settlor and not anticipated by him [continued investment in employer stock] would defeat or substantially impair the accomplishment of the purposes of the trust." *Id.* (quoting Restatement (Second) of Trusts § 227 cmt. q, mistakenly cited as cmt. g). "[I]n other words, the plaintiff must show that the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate;" moreover, if the ESOP fiduciary "does not maintain the investment in the employer's securities, it may face liability" for failing to comply with plan documents, "particularly if the employer's securities thrive." *Id.* at 571-72. The other

courts of appeals that have addressed the issue have uniformly agreed that a presumption of prudence applies in reviewing an ESOP fiduciary's decision to continue investing in employer securities.

3. The Fifth Third Plan. Fifth Third Bancorp ("Fifth Third") is a diversified financial services company headquartered in Cincinnati, Ohio. J.A. 24 (¶ 28); Pet. App. 43. During the relevant period, Fifth Third had $119 billion in assets and operated 16 affiliates with 1,311 full-service Banking Centers. *Id.*

Fifth Third sponsored the Fifth Third Bancorp Master Profit Sharing Plan ("Plan"), an individual account plan with a 401(k) feature. Pet. App. 29.[3] The Plan is designed to "provide retirement and other benefits for Participants and their respective beneficiaries," as well as a vehicle for participants to "invest primarily in qualifying employer securities." J.A. 284-85 (Plan, art. 1.2(a)). That vehicle is the Fifth Third Stock Fund, which "in all events . . . shall be an investment option," J.A. 735 (Trust Agreement, art. 3.3(a)), and which "shall be invested primarily in shares of common stock of Fifth Third Bancorp," J.A. 350-51 (Plan, art. 7.4(a)). *See also* J.A. 524-25 (Plan Appendix XVIII, art. 2(d)(1)) ("the Fifth Third Stock Investment Option . . . shall be one of the available

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[3] The Plan documents define the Plan as "a profit sharing plan except with respect to the following portions of the Plan which shall constitute a stock bonus plan and an employee stock ownership plan ("ESOP") as defined in section 4975(e)(7) of the [Internal Revenue] Code, designed to invest primarily in qualifying employer securities: (a) the portion of the Plan attributable to Employer matching contributions . . . [and] (e) effective December 31, 2001, the Fifth Third Stock Fund." J.A. 284-85 (Plan, art. 1.2).

investment options"); J.A. 599 (Plan Appendix XXI, art. 3(b)) (same); J.A. 500 (Plan Appendix XV, art. 5(b)) (same); J.A. 516 (Plan Appendix XVII, art. 11(b)) (same). The Plan documents formally designate this portion of the Plan as an ESOP. J.A. 284-85 (Plan, art. 1.2).

Eligible Fifth Third employees are permitted to make voluntary contributions to the Plan; they are free to direct these contributions to any of the Plan's 20 separate investment options, and are not obliged to select the Fifth Third Stock Fund. Pet. App. 30; J.A. 576-77 (Plan, Seventh Amendment art. 7.3) ("the Administrator shall direct the Trustee to make available at least three investment funds in addition to the Fifth Third Stock Fund"). Fifth Third also makes matching contributions of up to 4% of each employee's pre-tax compensation, which are initially invested in the Fifth Third Stock Fund. Pet. App. 30; J.A. 574-75, 576-77 (Plan, Seventh Amendment art. 4(a), 7.3). Plan participants have the sole discretion to buy, sell, or hold investments in the various options, allowing them (among other things) to immediately transfer any matching contributions initially invested in the Plan's ESOP component to another investment option. J.A. 576-77 (Plan, Seventh Amendment art. 7.3). Thus, all participants are free to buy, sell or hold Fifth Third stock indirectly by investing in (or by transferring out of) the Fifth Third Stock Fund. *Id.*

4. Respondents' Complaint. Respondents John Dudenhoeffer and Alireza Partovipanah are former employees of Fifth Third. J.A. 23-24 (¶¶ 26-27). During the financial crisis of 2008, respondents filed two separate class actions (later consolidated) against

Fifth Third Bancorp, Kevin T. Kabat and members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee (collectively, "petitioners") alleging violations of ERISA, pursuant to 29 U.S.C. § 1132(a)(2). J.A. 16 (¶ 1).

Respondents claim that petitioners breached their fiduciary duties by: (i) continuing to offer the Fifth Third Stock Fund as a Plan investment option when it was imprudent to do so during the financial crisis of 2008; (ii) continuing to invest Plan assets in Fifth Third stock; (iii) failing to divest the Plan of all Fifth Third stock; and (iv) engaging in this conduct when Fifth Third stock allegedly was an "imprudent investment." J.A. 53, 104 (¶¶ 100, 244).[4] Respondents proposed to bring these claims on behalf of themselves and other Plan participants seeking recovery for losses allegedly sustained by the Plan resulting from its investment in Fifth Third stock during the putative class period, *i.e.* from July 19, 2007 through the present. J.A. 19, 105 (¶¶ 13, 14, 246).

Respondents claim that petitioners had a fiduciary duty under ERISA to use material nonpublic information about Fifth Third for respondents' benefit. They allege that Fifth Third's "faulty business model" transformed the company from a conservative lender to a de facto subprime lender, which resulted in the

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[4] In addition to their "prudence" claim, respondents brought a "misrepresentation" claim – alleging petitioners breached their fiduciary duties under ERISA by incorporating by reference allegedly false and misleading SEC filings into plan documents – as well as additional derivative claims, none of which are before the Court.

"artificial inflation" of Fifth Third's stock price. J.A. 52-57 (¶¶ 96-112). They allege that overexposure to the declining housing and construction market, exposure to subprime loans, and mismanagement contributed to an "unacceptable level of risk borne by Plan participants, as a result of the Plan's investment in Fifth Third Stock." J.A. 54-55 (¶ 103). According to respondents, these risks were not disclosed to the public, but were known or should have been known to petitioners "[t]hrough their high-ranking positions within the Company." J.A. 87 (¶ 189). Respondents do not allege the magnitude of the "artificial inflation" of Fifth Third's stock price, nor do they make any allegations about the long-term prognosis for the stock or viability of the company.

Fifth Third's stock price declined substantially during 2008, but the company reported substantial profits in both 2007 and 2009 and its stock price "rebounded substantially" during the relevant period. Pet. App. 43.[5]

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[5] Respondents allege that the price of Fifth Third stock declined from $25.61 per share in December 2007 to a low of $2.85 per share on January 22, 2009. Pet. App. 43. The price of Fifth Third stock rebounded to $12.06 per share the day the district court issued its decision (November 24, 2010), $14.89 the day the Sixth Circuit issued its decision (September 5, 2012), $15.27 the day the Sixth Circuit denied rehearing and rehearing *en banc* (October 12, 2012), and $20.09 the day this Court granted certiorari (December 13, 2013). Historical Prices for Fifth Third Bancorp (FITB) Stock, Wall St. J., http://quotes.wsj.com/FITB/historical-prices (last visited Jan. 24, 2014). Fifth Third stock closed at $21.32 on January 24, 2014. *Id.*

5. The District Court's Decision. The district court granted petitioners' motion to dismiss the complaint for failure to state a claim. Pet. App. 28-52. The district court first held that "the Fifth Third Stock Fund plainly is an ESOP." Pet. App. 34. Applying the Sixth Circuit's decision in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), the district court then held that petitioners, as ESOP fiduciaries, are entitled to a presumption of reasonableness with respect to their decision to invest in employer stock. Pet. App. 37.

The district court held that, in order to state a claim for breach of fiduciary duty that would survive a motion to dismiss, respondents were required to plead facts sufficient to overcome the presumption of reasonableness by plausibly alleging that ESOP fiduciaries abused their discretion by remaining invested in employer stock. Pet. App. 37-38 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). The district court noted that other courts had reached the same conclusion. *Id.*

The district court held that the complaint failed to allege facts sufficient to overcome the presumption of reasonableness. Pet. App. 39-46. The complaint failed to "establish any facts which would have caused a reasonable fiduciary to cease offering Fifth Third stock as an investment option and/or divest Fifth Third stock from the Plan entirely." Pet. App. 45-46. The district court reasoned that: (i) the complaint demonstrates that Fifth Third remained viable despite a drop in its stock price; (ii) several large state pension funds actually increased their holdings in Fifth Third stock during the class period; (iii) Fifth Third's stock price rebounded substantially during the class period; and

(iv) the allegations in the complaint challenged Fifth Third's business judgment, which is not actionable under ERISA. Pet. App. 44-47.

The district court held that respondents' allegation that Fifth Third's stock price was "artificially inflated" during the class period did not change the outcome, because "there is no principled difference between how a fiduciary should respond to 'artificial inflation' of the stock price as opposed to other sorts of negative insider information." Pet. App. 46 (citing *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 254 (5th Cir. 2008)). The presumption of reasonableness "logically applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock," as the standard of review of such decisions does not turn on "pleading artifices." *Id.* The district court therefore dismissed respondents' breach of fiduciary duty claim to the extent it relied on the continued offering of, and failure to divest the Plan of, Fifth Third stock. Pet. App. 47.[6]

6. The Court of Appeals' Decision. The Sixth Circuit reversed. Pet. App. 1-25. The court of appeals recognized that its prior decisions acknowledged and applied a presumption of reasonableness to an ESOP fiduciary's decision to invest in employer stock, but the court of appeals concluded that the presumption does not apply at the motion to dismiss stage. Pet. App. 11-13 (citing *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d

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[6] The district court also dismissed respondents' "misrepresentation" claim and their derivative claims, which are not presently before the Court; the Sixth Circuit reversed the dismissal of these claims.

585 (6th Cir. 2012)). The court of appeals acknowledged that other "circuits have reached a different conclusion." Pet. App. 12. To reach a contrary result, the Sixth Circuit recast the presumption of reasonableness as an evidentiary presumption rather than a standard of review, and held that application of the presumption requires a fully developed evidentiary record that does not exist at the pleading stage. Pet. App. 11-12.

The court of appeals further held that plausible allegations that an ESOP fiduciary abused its discretion by continuing to invest in employer stock are not necessary to state a breach of fiduciary duty claim under ERISA. Pet. App. 12-13. Instead, the Sixth Circuit held that "*all* fiduciaries, including ESOP fiduciaries" are subject to "identical standards of prudence and loyalty," describing an "equality of standard" for all fiduciaries. Pet. App. 12-13. Thus, plaintiffs challenging an ESOP fiduciary's decision are required to allege only that "a prudent fudiciary acting under similar circumstances would have made a different investment decision." Pet. App. 12. The court of appeals concluded that "if a 'prudent man acting in a like capacity and familiar with such matters' would not have undertaken that conduct at issue, then an ESOP or any other fiduciary may not do so." Pet. App. 13.

Petitioners filed a petition for rehearing and rehearing en banc, which the Sixth Circuit denied. Pet. App. 53-54.

SUMMARY OF ARGUMENT

1. ESOPs are unique, "designed to invest primarily in qualifying employer securities," and favored by Congress because of that purpose. 29 U.S.C. § 1107(d)(6)(A). When a plaintiff challenges an ESOP fiduciary's decision to invest in employer securities – that is, to do exactly what the terms of the plan require – the plaintiff has a difficult burden. To establish a violation of ERISA's duty of prudence, the plaintiff must overcome the substantial deference owed the fiduciary, typically expressed as a presumption of prudence. Specifically, the plaintiff cannot prevail unless extraordinary circumstances, such as a serious threat to the employer's viability, mean that continued investment would substantially impair the purpose of the plan. That deferential standard is required by the text of ERISA, is derived from trust law, and is necessary to further Congress's purposes and to avoid unnecessary conflicts with the federal securities laws.

a. The court below's insistence on a single, inflexible standard of prudence, applicable to ESOPs and non-ESOPs alike, is inconsistent with the statutory text. ERISA defines the duty of prudence based on how a prudent man would act "in the conduct of an enterprise *of a like character and with like aims*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added). An ESOP's purpose is to allow employees to build a long-term ownership stake in their employer. A prudent person responsible for an enterprise with the character and aims of fostering employee ownership of one company would not divest that company's securities simply because its share price fell. Moreover, section 1104(a)(1)(D) separately expresses Congress's intent

that fiduciaries generally adhere to the terms of the plan. A robust presumption that ESOP fiduciaries have acted prudently in investing in employer securities, subject to rebuttal based only on extraordinary circumstances threatening the plan's purpose of fostering employee ownership over the long term, flows directly from this statutory scheme.

b. Trust law confirms this standard and supplies guidance on how it applies. Under trust law, the prudence of an investment decision depends on the particular provisions and circumstances of the trust. While the prudent investor generally adheres to the trust's investment instructions, the "deviation doctrine" allows for departures where, because of a change of circumstances, compliance would substantially impair the accomplishment of the trust's purposes. These principles appropriately inform the correct standard of review for ESOP fiduciaries. Since the fundamental purpose of an ESOP is to build employees' equity interest in their employer, a mere decline in stock price does not substantially impair the plan's purposes. By contrast, if there is a serious threat to the company's ongoing viability, continued investment in its securities may no longer advance the plan's primary purpose, because a collapse would leave employees with no meaningful ownership interest in their employer. Applying trust law principles, liability for a violation of the duty of prudence by an ESOP fiduciary is limited to such extraordinary circumstances.

c. Congress's emphatic purpose of promoting employee ownership through ESOPs further supports a robust presumption of prudence. The structure of ERISA, combined with incentives in the tax code, make

clear Congress's policy of favoring ESOPs. That purpose is revealed not just in legislative history, but in statutory text: in the Tax Reform Act of 1976, Congress expressly stated ERISA's purpose of "encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system"; emphasized that ESOPs should not be "treat[ed]" like "conventional retirement plans"; and warned against rulings that could "block the establishment and success of these plans." Pub. L. No. 94-455, § 803(h). A standard of prudence requiring a fiduciary to abandon investment in employer securities because of a drop in stock price would defeat Congress's purpose.

More broadly, a less deferential standard would undermine Congress's policy of encouraging employers to voluntarily offer ESOPs. Absent a strong presumption of prudence, an ESOP fiduciary would be placed "on a razor's edge," subject to lawsuits for buying and holding employer securities (for purported violations of the duty of prudence), and equally subject to lawsuits for *selling* those securities (for failure to adhere to the terms of the plan) if they recover in value. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Allowing this costly result would not benefit employees, who in most plans, including Fifth Third's, are free to avoid the risks inherent in ESOPs and to elect to invest in diversified investment options. The Sixth Circuit's standard would instead undermine Congress's intent by dissuading employers from offering these plans. *See Conkright v. Frommert*, 559 U.S. 506, 516-17 (2010).

d. Insufficient deference to ESOP fiduciaries would also result in an avoidable collision between ERISA and the federal securities laws. Respondents' theory, representative of the typical ESOP "stock drop" case, is that petitioners failed to use material nonpublic information for plan participants' benefit. But that is unlawful insider trading; ERISA need not and should not be interpreted to require what the securities laws forbid. To be sure, an ESOP fiduciary in possession of material nonpublic information could lawfully cease making new investments or make the adverse information public, but these half-measures would be unavailing. Were an ESOP simply to cease making new investments in employer securities, that would likely spark a negative market reaction, damaging the value of the securities the plan already holds. Disclosing adverse information would also not help plan participants, since the market would adjust: the ESOP would be able to diversify its holdings of employer securities only at a non-inflated price, and the disclosure would therefore not aid participants. Moreover, Congress cannot have intended ERISA to have far-reaching ripple effects on corporate disclosures.

2. For the reasons explained above, ERISA strictly limits the circumstances in which an ESOP fiduciary's decision to invest in employer securities can be deemed imprudent. If a plaintiff cannot plausibly allege facts showing extraordinary circumstances that would render an investment decision imprudent *in the context of an ESOP*, she has not stated a viable claim. This result does not change simply because courts have referred to this deferential standard as a "presumption." This Court and others have frequently

applied presumptions at the pleading stage where the plaintiff has not alleged facts sufficient to overcome the presumption and to establish entitlement to relief. While some presumptions have limited evidentiary purposes, others impose a heavy burden of persuasion and apply at the pleading stage. Properly understood, the presumption of prudence is the latter kind: it expresses the substantive standard ERISA requires plaintiffs to meet to establish a breach of the duty of prudence. There is no reason to allow a plaintiff whose allegations do not meet the substantive standard of liability to proceed to expensive discovery.

3. Measured against the correct legal standard, respondents' pleadings cannot survive a motion to dismiss. They allege that petitioners knew or should have known that Fifth Third's stock price would fall, and that in these circumstances it was imprudent not to divest. But they allege no facts that would plausibly show that continued investment would substantially impair the purpose of the ESOP, *i.e.*, long-term investment in Fifth Third. Absent allegations meeting this standard, petitioners satisfied the duty of prudence as a matter of law, and the complaint must therefore be dismissed.

ARGUMENT

I. An ESOP Fiduciary's Decision To Continue Investing In Employer Securities Is Presumptively Prudent Absent Extraordinary Circumstances That Make The Decision Inconsistent With The ESOP's Purposes.

ESOPs are unique. Recognized and encouraged by Congress, ESOPs are designed for the express purpose of investing in employer securities. Consistent with this stated purpose, the law does not regard ESOPs "as conventional retirement plans," which are designed solely for the purpose of providing retirement benefits and not for the purpose of developing an equity stake in a particular company. Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h). Indeed, Congress has declared that ESOPs should not be treated as conventional retirement plans, lest such treatment "block the establishment and success of these plans." *Id.*

The unique character and aims of ESOPs have important consequences under ERISA. For example, the acquisition or holding of qualifying employer securities by ESOPs and other EIAPs are exempt from the otherwise applicable 10% limit on investment in employer securities, 29 U.S.C. § 1107(a), as well as the requirement to "diversify[ ] the investments of the plan so as to minimize the risk of large losses," *id.* § 1104(a)(1)(C). *See id.* §§ 1104(a)(2), 1107(b). Congress also exempted the acquisition or holding of qualifying employer securities by ESOPs and other EIAPs from "the prudence requirement (only to the extent it requires diversification)." *Id.* § 1104(a)(2).

Because Congress did not waive the duty of prudence entirely, courts have had to determine how that duty applies to ESOP fiduciaries. As this Court has explained, ERISA requires the federal courts to elaborate on the duty of prudence and other fiduciary duties "as they develop a federal common law of rights and obligations under ERISA-regulated plans." *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1987)) (internal quotation marks omitted). Over the past twenty years, courts of appeals have done exactly that, ruling that a deferential standard of review is required in applying the duty of prudence to ESOP fiduciaries.

Beginning with *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), the courts of appeals have applied a deferential of standard of review through a presumption that an ESOP fiduciary's decision to invest in employer securities is reasonable and proper. *See White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 988-91 (7th Cir. 2013); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1280-81 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 475 (2012); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 253-56 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995).[7] Nearly all of these courts have concluded that

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[7] In granting certiorari, the Court did not accept the Government's suggestion to re-write the question presented to consider whether ESOP fiduciaries should be accorded a presumption that continuing to invest in employer securities is prudent. *See* U.S. Cert. Br. 19. The following discussion of the question presented

plaintiffs bear a heavy burden in overcoming this presumption, holding that an ESOP fiduciary's decision to continue investing in employer securities is not imprudent absent extraordinary circumstances such as the "impending collapse" of the company. *See, e.g.*, *Quan*, 623 F.3d at 882.

The decision below, however, allows plaintiffs to rebut the presumption merely by showing that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 11 (quoting *Kuper*, 66 F.3d at 1459). The court of appeals refused to tailor its standard to the special statutory context and purpose of ESOPs, instead holding that ERISA "imposes identical standards of prudence and loyalty on *all* fiduciaries." Pet. App. 13. As a result, the court treated an ESOP fiduciary's decision to invest in employer securities as subject to the same standard of review as any other fiduciary decision with respect to any other investment under any other plan.

This result is inconsistent with the deferential standard of review required by ERISA. When a plaintiff challenges an ESOP fiduciary's decision to invest in employer securities, that decision is presumptively prudent – that is, it satisfies the statutory duty of prudence – unless the plaintiff can

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nevertheless describes the source of the presumption, and explains that the presumption has not been judicially "imposed" based solely on "policy considerations," U.S. Cert. Br. 11. *See infra* Parts I.A-D. Moreover, "[t]he very strength of th[e] consensus" among lower courts on the existence and validity of the presumption "supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004).

establish extraordinary circumstances that make continued investment in employer securities fundamentally inconsistent with the purposes of the plan. For example, if a company is faced with impending collapse, the plan's core goal of employees holding an ownership interest in their employer would be jeopardized; the virtues of employee ownership disappear if the employer itself disappears. A mere drop in stock price based upon business or market-wide fluctuations, by contrast, does not render continued investment fundamentally inconsistent with the objective of building employee ownership over the long term. Thus, the statutory duty of prudence does not require a fiduciary to cease investing in employer securities solely because of a drop in stock price.

As we explain below, ERISA requires courts to apply a highly deferential standard in reviewing the prudence of an ESOP fiduciary's continued investment in employer securities. *First*, a deferential standard of review conforms to the statutory text. Congress expressly provided that the content of the duty of prudence is informed by the "character" and "aims" of the plan. This language requires a strong presumption that an investment decision is prudent when the very character and aims of the plan are defined by that particular ERISA-sanctioned investment. *Second*, the standard is supported by trust law. Under trust law, the terms of a trust modify the duty of prudence, and a trustee can depart from investment instructions set forth in the trust instrument only when faced with a substantial impairment of the trust's purposes. Both of these principles properly inform an ESOP fiduciary's duty of prudence under ERISA. *Third*, the importance of substantial deference for ESOP fiduciaries is

bolstered by the policies and purposes of ERISA. One of Congress's key objectives was to encourage employers to offer voluntary retirement plans in general, and ESOPs in particular. Without substantial deference to their decisions, ESOP fiduciaries will frequently find themselves "on a razor's edge," subject to one lawsuit if they buy (or continue to hold) and another suit if they sell. *Armstrong, v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). *Finally*, insufficient deference to ESOP fiduciaries would create a collision with the federal securities laws, requiring fiduciaries to either engage in prohibited insider trading or take self-defeating half-measures. ERISA can and should be interpreted to be in harmony with securities law, not at war with it.

A. A Robust Presumption Of Prudence Is Required By The Terms Of ERISA.

ERISA requires plan fiduciaries to discharge their duties

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise *of a like character and with like aims*[.]

29 U.S.C. § 1104(a)(1)(B) (emphasis added).

The Sixth Circuit's insistence on an "equality of standard" for all plans and all investment decisions, Pet. App. 13, is inconsistent with this statutory language. Congress expressly directed that the prudence of an investment decision be evaluated not by applying some abstract standard of sound investment

management, but by making a context-specific comparison to "an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). *See also* Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the Subcomm. on Gen. Labor of the House Comm. on Ed. & Labor, 91st Cong. 1st & 2d Sess. 467 (Apr. 16, 1970) (testimony of Secretary of Labor George P. Shultz) (hereinafter "Shultz Testimony") (explaining that the text of ERISA's prudence standard has "built-in flexibility" requiring a court to take into account the "goals of the plan").[8]

The core characteristic of ESOPs is that they are, by definition, "designed to invest primarily in qualifying employer securities." 29 U.S.C. § 1107(d)(6)(A). Congress has specifically distinguished this unique purpose of "bringing about stock ownership by all corporate employees" from that of "conventional retirement plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h). ESOPs are "designed to build equity ownership of shares of the employer corporation." H.R.

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[8] *See also* 29 C.F.R. § 2550.404a-1(b)(1) ("With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of [29 U.S.C. § 1104(a)(1)(B)] . . . are satisfied if the fiduciary (A) has given appropriate consideration to the facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, *including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties, and (B) has acted accordingly*" (emphasis added)); *id.* § 2550.404a-1(b)(2) (appropriate consideration includes whether the investment "further[s] the purposes of the plan").

Rep. No. 93-1280, at 313 (1974) (Conf. Rep.); *see also* Senate Special Committee on Aging, Developments in Aging: 1989, S. Rep. No. 101-249, at 94 (1990) ("Employee stock ownership plans were promoted as a means for transferring the ownership of a company's capital to its workers."). Although ESOPs "can become a valuable source of retirement income to supplement Social Security, pension benefits and personal savings, they are not designed (or intended) to be an employee's sole or primary retirement savings vehicle." *Id.*; *see also* Staff of S. Committee on Finance, Employee Stock Ownership Plans, 96th Cong., 2d Sess. 27 (Comm. Print 1980) (noting "Congressional intent that an ESOP is not primarily a retirement plan, but rather has as its primary objective the providing of stock ownership interests for employees").

In the terms of section 1104(a)(1)(B), the "character" of an ESOP is a vehicle for making one particular investment, and its "aim" is to foster employees' ownership stake in the company they work for. An ESOP fiduciary's duty of prudence is therefore to act as a prudent person would in conducting an enterprise with a similarly restricted investment agenda and a similar purpose of building equity in one specific company.

Because ERISA's duty of prudence is attuned to the "character and aims" of a plan, a fiduciary of an ordinary retirement plan might act imprudently by investing in a particular company, but act prudently by making the same investment for an ESOP. Indeed, it will be the rare case when an ESOP fiduciary acts imprudently by doing precisely what the plan was "designed" to do. 29 U.S.C. § 1107(d)(6)(A). For

example, a prudent fiduciary managing an enterprise whose express purpose is holding a particular security as a long-term investment would not necessarily divest that security simply because its price fell. Indeed, that long-term strategy might be furthered by buying the security at what proves to be a bargain price – Fifth Third stock purchased at its lowest point, for example, has since increased in value more than seven-fold. *Supra* p. 12, n. 5. It would take a more extreme change in circumstances, such as a serious threat to the continued viability of the company, to conclude that a prudent fiduciary of *this type* of enterprise would divest the stock.

The character of the plan is relevant in another important respect: the Fifth Third Plan, like many 401(k) plans, offers employer stock as one investment option, and allows participants to opt out of building an equity stake in their employer at any time. Thus, if a Fifth Third employee's individual circumstances counsel against the risk of large losses inherent in undiversified investments, she has ample alternatives. In reality, respondents' claim is not that petitioners invested their funds imprudently, but that petitioners "acted imprudently *by allowing employees* to choose to buy and hold an employer's stock." *White*, 714 F.3d at 981 (emphasis added). Since the prudent fiduciary would take the availability of employee choice into account, this additional aspect of the "character" of the Fifth Third ESOP (and many like it) bolsters the case for substantial deference to ESOP fiduciaries.

This interpretation of the duty of prudence as it applies to ESOP fiduciaries is bolstered by section 1104(a)(1)(D). That provision requires fiduciaries to

act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with this subchapter and subchapter III of this chapter." To be sure, in the case of a *true* conflict, plan terms that are inconsistent with the fiduciary's statutory duties cannot be enforced. But whereas the Government leaps to find conflict to justify departures from an ESOP's terms, U.S. Cert. Br. 11-12, the proper approach is to avoid conflict if possible and to give meaning to both parts of the statute. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (parts of a statute should, "if possible," be read as a "harmonious whole" (citation and internal quotation marks omitted)). Since Congress expressly provided that the duty of prudence takes into account the "character and aims" of a plan, ESOP fiduciaries typically can comply with both subsection (a)(1)(B) and subsection (a)(1)(D) by adhering to the terms of the plan. *See also infra* Part I.B (explaining that under trust law, the terms of the trust modify and inform the duty of prudence).[9]

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[9] The Government also argues that "[b]y preserving the duty of prudence for ESOPs *except* insofar as it requires diversification, Congress expressed its intent that the same general standard of prudence would govern ESOP fiduciaries as other ERISA fiduciaries." U.S. Cert. Br. 11. That argument makes a basic logical error. It follows from Congress's decision to *exempt* ESOP fiduciaries from only a portion of the prudence requirement that those fiduciaries remain subject to the general duty; petitioners do not contend otherwise. It does not follow, however, that the *content* of that duty is unaffected by the purposes of the Plan at issue. Petitioners' view of the statute gives full effect to the diversification exemption and its limits, recognizing that the duty of prudence continues to apply to ESOPs. The Government, by contrast, reads the "character and aims" language out of the

In sum, Congress has crafted a regime that requires interpreting the duty of prudence based on the character and aims of the plan at issue. Because the fundamental purpose of an ESOP is to foster employee ownership through investment in employer securities, a presumption that ESOP fiduciaries have acted prudently by investing in such securities, subject to rebuttal based only on extraordinary circumstances threatening the plan's purpose (in trust law terms, the "settlor's intent"), flows directly from this statutory scheme.

B. A Robust Presumption Of Prudence, And The Substantive Standard For Overcoming It, Are Derived From Trust Law.

This Court has recognized that ERISA's "fiduciary duties," including "th[e] prudent man rule," "draw much of their content from the common law of trusts." *Varity Corp.*, 516 U.S. at 496-97; *see also Conkright*, 559 U.S. at 512 (explaining that the court "look[s] to" trust law for "guidance" when "ERISA's text does not directly resolve the matter"). Trust law confirms the need for a distinct standard of prudence for ESOPs, and supplies guidance on how that standard should be applied.

As explained above, the text of section 1104(a)(1)(B) requires the duty of prudence to be applied in light of the "character and aims" of the plan. Trust law confirms this principle. The Restatement explains that

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statute by assuming that, whenever the duty applies, it must apply in the same way, regardless of the character and aims of the plan.

a trustee must act "as a prudent investor would, *in light of the purpose, terms*, distribution requirements, and other circumstances of the trust." Restatement (Third) of Trusts § 90 (emphasis added); *see also* Uniform Trust Code § 804 ("A trustee shall administer the trust as a prudent person would, *by considering the purposes, terms*, distributional requirements, and other circumstances of the trust." (emphasis added)). In other words, the trustee's performance must be evaluated not by comparing her performance to some abstract ideal of "prudence," but rather by determining what is prudent under the particular provisions and circumstances of the trust.[10]

While a prudent fiduciary *generally* adheres to the specific terms of the trust, trust law also establishes a standard for departing from those terms (the "deviation

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[10] Although trust law and ERISA reach essentially the same result in circumstances like those presented here, they do so by slightly different paths. The traditional articulation of the trust law standard of prudence is that trustees must "observe how men of prudence, discretion and intelligence manage their own affairs." *Harvard College v. Amory*, 26 Mass. 446, 461 (1830). By contrast, the ERISA standard of prudence was intentionally drafted to be more flexible. *See* Shultz Testimony at 467. Although the traditional trust law standard does not expressly refer to the character and aims of the trust, trust law reaches essentially the same result by applying a rule that "the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument." George Gleason Bogert et al., Law of Trusts and Trustees § 541. While ERISA does not allow an employer to reduce or waive the statutory duty of prudence, 29 U.S.C. § 1104(a)(1)(D), the common denominator under both ERISA and trust law is that a fiduciary's decision cannot be deemed imprudent without considering the terms and purposes of the trust.

doctrine"). Although specific investment instructions are "*presumptively* valid," they can be overcome due to "changed circumstances." John H. Langbein & Richard A. Posner, Trust-Investment Law: II, 1977 Am. B. Found. Res. J. 1, 34 (emphasis added).[11] This exception, however, is strictly circumscribed: "trust provisions . . . generally control, unless compliance is impossible or illegal or there has been such a change of circumstances that compliance would defeat or substantially impair the accomplishment of the trust purposes." 4 A. Scott, W. Fratcher & M. Ascher, Scott and Ascher on Trusts § 19.1.2, p. 1419 (5th ed. 2007); Restatement (Second) of Trusts § 167 ("The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.").[12]

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[11] Even in these circumstances, judicial authorization typically is required before a trustee abandons a term of the trust. That requirement makes it even more difficult to depart from investment directions contained in the trust. In light of ERISA's purpose of avoiding costly litigation, however, no one has suggested that an ESOP fiduciary must seek judicial approval prior to reducing investment in employer securities in appropriate circumstances.

[12] The Third Restatement expresses this doctrine in arguably broader language, permitting deviations that "will further the purposes of the trust." Restatement (Third) of Trusts § 66(1). To the extent trust law has changed, courts should be guided by the common law as it stood when Congress enacted ERISA. *See Moench*, 62 F.3d at 571 & n.6. The Second Restatement's formulation of the doctrine also better serves the purposes of ERISA with respect to ESOPs. *See infra* Part I.C. In any event,

The famous case of Joseph Pulitzer's trust illustrates the application of, and inherent limitations on, trust law's deviation doctrine. *In re Pulitzer's Estate*, 249 N.Y.S. 87 (Surr. Ct. 1931), *aff'd. sub nom In re Pulitzer*, 260 N.Y.S. 975. (App. Div. 1932). Pulitzer's will established a trust with the instruction that the stock of his favorite newspaper, *The New York World*, not be sold. *Id.* at 92. However, circumstances changed such that continued publication of the newspaper "will in all probability lead to a serious impairment or the destruction of a large part of the trust estate." *Id.* at 94. Under these "extraordinary circumstances," the court concluded that Pulitzer's "dominant purpose" of providing continuing income to his family should be furthered rather than allow "the entire trust asset [to be] destroyed or wrecked by bankruptcy or dissolution." *Id.* at 93-95. Significantly, this result was based on both "extraordinary circumstances" threatening bankruptcy, as well as the court's finding that Pulitzer's goal of continued investment in the *World* was merely subsidiary to his "dominant purpose" of providing continuing income for his family.

The Court can appropriately look to these trust law principles in determining the correct standard of review for ESOP fiduciaries. *See Moench*, 62 F.3d at 571-72. Consistent with trust law, an ESOP fiduciary's decision to adhere to the terms of the plan and invest in employer securities should generally be deemed

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since the core purpose of an ESOP is investment in employer securities, extraordinary circumstances would be necessary to establish that ceasing to invest in employer securities would "further the purposes of the [plan]."

prudent. Also consistent with trust law, prudence dictates deviation from the plan's instructions only when changed circumstances threaten to "defeat or substantially impair" the purposes of the trust.

The fundamental purpose of an ESOP (*i.e.*, the intent of the settlor) is to build employees' equity interest in their employer through investment in its securities. 29 U.S.C. § 1107(d)(6)(A); *see supra* Part I.A. Since a mere decline in stock prices, even a substantial one, does not pose a long-term threat to this purpose, continued investment in employer securities is not imprudent. Indeed, in exempting ESOP fiduciaries from the duty to diversify investments "so as to minimize the risk of large losses," Congress plainly contemplated that ESOPs would be subject to the risk of substantial declines in stock prices. 29 U.S.C. §§ 1104(a)(1)(C), (a)(2). The result could be different if there were a serious threat to "the company's viability as an ongoing concern," or a "precipitous decline in the employer's stock" were "combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement." *Quan*, 623 F.3d at 882 (citation and internal quotation marks omitted). An ESOP's purpose of building employees' equity stake in their employer would be defeated if the employer collapses altogether, leaving employees with *no* meaningful ownership interest. It is therefore only in rare and extraordinary circumstances, and not run-of-the-mill "stock drop" cases, that the duty of prudence requires ESOP fiduciaries to deviate from the plan terms and abandon the plan's prescribed – and congressionally-approved – mission of investing in employer securities.

C. A Robust Presumption Of Prudence Advances Fundamental Goals Of Employee Benefits Law.

In interpreting ERISA's fiduciary duties, this Court also looks to the "guiding principles . . . underlying ERISA." *Conkright*, 559 U.S. at 516; *see also Varity Corp.*, 516 U.S. at 497 (after consulting trust law to "inform . . . an effort to interpret ERISA's fiduciary duties," "courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements"). Here, Congress's emphatic policy of promoting employee stock ownership through ESOPs supports a highly deferential standard of review for ESOP fiduciaries.

As the courts of appeals have unanimously recognized, "Congress has repeatedly expressed its intent to encourage the formation of ESOPs by passing legislation granting such plans favorable treatment, and has warned against judicial and administrative action that would thwart that goal." *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983). The structure of ERISA demonstrates Congress's policy of promoting ESOPs by relieving them of various restrictions. *See* 29 U.S.C. § 1104(a)(2) (exemption from the duty to diversify); *id.* § 1107(b) (exemption from 10% limit on investment in employer securities); *id.* § 1108(b)(3) (permitting ESOPs to borrow from employer to fund investment in employer stock); *id.* § 1108(e) (exemption from restriction on transactions between plan and sponsoring employer for purchases

and sales of employer securities).[13] The Internal Revenue Code also offers tax incentives for employers to maintain plans that invest in employer stock. *See, e.g.*, 26 U.S.C. § 404(k) (deductible dividends on employer stock held by ESOP); *id.* § 402(e)(4) (preferential tax treatment for distributions of appreciated employer stock); *id.* § 1042 (deferring tax on gain from sale of employer stock to ESOP).[14]

ERISA's legislative history confirms the statutory purpose of promoting employee stock ownership. *See supra* pp. 25-27. Even more to the point, two years

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[13] These features were the result of Congress's considered judgment. ERISA was enacted "following almost a decade of studying the Nation's private pension plans." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980). Congress adopted many of the recommendations made in a 1965 report to President Johnson by a Cabinet-level committee. *See* President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans (1965). ESOPs, however, were an important exception: Congress rejected recommendations to repeal favorable tax treatment for distributions of appreciated employer stock and to impose an across-the-board 10% limit on the portion of plan assets that could be invested in employer stock, *id.* at xiii & xvi, deciding instead to promote ESOPs and EIAPs.

[14] Congress has continued to legislate regarding employee stock ownership. The Pension Protection Act of 2006, for example, requires certain plans to provide participants with the right to diversify their investments. *See* Pub. L. No. 109-280, §§ 507-09, 621, 901, 120 Stat. 780, 948-52, 978-79, 1026-033. Thus, Congress has recognized the risks that come with the benefits of ESOPs, and has addressed those risks through employee choice, not by placing ESOP fiduciaries in an untenable position.

after enacting ERISA, Congress codified by statute its goals with respect to ESOPs:

> INTENT OF CONGRESS CONCERNING EMPLOYEE STOCK OWNERSHIP PLANS
>
> The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, *the Employee Retirement Income Security Act of 1974*, the Trade Act of 1974, and the Tax Reduction Act of 1975) and this Act has made clear its *interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system* which will solve the dual problems of securing capital funds for necessary capital growth and of *bringing about stock ownership by all corporate employees*. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by *regulations and rulings which treat employee stock ownership plans as conventional retirement plans*, which reduce the freedom of the employee trust and employers to take the necessary steps to implement the plans, and which otherwise *block the establishment and success of these plans*. Because of the special purposes for which employee stock ownership plans are established, it is consistent with the intent of Congress to permit these plans (whether structured as pension, stock bonus, or profit-sharing plans) to distribute income on employer securities currently.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h) (emphases added).[15] *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958) ("Subsequent legislation which declares the intent of an earlier law . . . is entitled to weight when it comes to the problem of construction.").

Congress's purpose of encouraging stock ownership confirms the need for a robust presumption and supports the trust law-derived standard needed to overcome it: plaintiffs must establish that continued investment would substantially impair the purposes of the plan. The goal of employees "build[ing] equity ownership of shares in the employer corporation," H.R. Rep. No. 93-1280, at 313, is inherently a long-term proposition. If the employer's stock price drops in the short-term due to adverse business developments, the virtues of building employee equity over a longer time horizon are ordinarily still achievable and worthwhile. Moreover, even if holding employer stock were not an end in itself, it would be fruitless to attempt to "outsmart the stock market" through short-term speculation. *White*, 714 F.3d at 982. A fiduciary that

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[15] In addition to Congress's philosophical reasons for favoring employee ownership, the leading congressional advocates for ESOPs also pressed a functional case: "companies with employee ownership are likely to be more productive and more profitable than those without, and the more ownership held by employees, the better the performance of the company." 129 Cong. Rec. 33,814 (1983) (statement of Sen. Russell Long).

does so might well miss an opportunity to accumulate employer securities at what proves to be a bargain price, and to profit when that stock rebounds (as Fifth Third stock has done here, *supra* p. 12, n.5). Accordingly, a standard of prudence requiring the fiduciary to abandon investment in employer securities simply because of a short-term drop in stock price is inconsistent with Congress's purposes.

More broadly, a less deferential standard would undermine Congress's purpose of encouraging employers to voluntarily offer ESOPs. *See Conkright*, 559 U.S. at 516-17 ("Congress did not require employers to establish benefit plans in the first place," and so sought to "induc[e] employers to offer benefits by assuring a predictable set of liabilities"); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans.").[16] In the ESOP context, Congress specifically warned against "rulings which treat employee stock ownership plans as conventional retirement plans" and

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[16] *See also* H.R. Rep. No. 93-807, at 2 (1974) ("[P]rivate retirement plans are voluntary on the part of employers, and, therefore, it has weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits."); H.R. Rep. No. 93-779, at 2 (1974) (same); *see also* H.R. Rep. No. 93-533, at 2 (1973) ("The bill is designed to . . . promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits."); S. Rep. No. 93-383, at 10-11 (1973) (bill encourages voluntary establishment of retirement plans); S. Rep. No. 93-127, at 13-14 (1973) (bill strikes "an appropriate balance" between employers' and labor organizations' interest in design flexibility and workers' need for adequate protection).

thereby "block the establishment and success of these plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h). If plaintiffs who bring lawsuits like this one are allowed to proceed without pleading facts sufficient to overcome a robust presumption of prudence, ESOP fiduciaries will be placed in an untenable position. On the one hand, they will face litigation for allegedly violating the duty of prudence if they do not dispose of employer stock when its price drops. On the other hand, they will face litigation under section 1104(a)(1)(D) if they override the terms of the plan by halting the purchase of employer stock or by liquidating the plan's holdings of employer stock.

Two cases involving the W.R. Grace 401(k) plan demonstrate that this predicament is not hypothetical: the plaintiffs in one case alleged that the plan fiduciaries had violated their duties by allowing the plan to invest in W.R. Grace stock for too long, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008); the plaintiffs in the other case complained that the fiduciaries had caused the plan to sell W.R. Grace stock too soon, before its price increased substantially, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 2-3 (1st Cir. 2009). *See also Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006) ("[I]f State Street had sold earlier and the stock had then bounced back, as American Airlines' stock did, State Street might well have been sued by the same plaintiffs . . . ."). The result is to "seat ESOP trustees on a razor's edge," *Armstrong*, 446 F.3d at 733, and treat them as "virtual guarantors of the financial success of the . . . plan," *Moench*, 62 F.3d at 570 – at risk if they permit continued investment in employer stock, and equally at risk if they do not. The

history of Fifth Third's stock price epitomizes this dilemma. *See supra* p. 12, n.5.

Placing fiduciaries in an untenable position is unlikely to benefit employees – who, it should be recalled, are typically given "the responsibility and freedom to choose" whether to invest in an ESOP or a more conservative option. *White*, 714 F.3d at 994. Employers are likely to pay for increased litigation costs by diverting funds that would otherwise be used to provide additional benefits, or opting out of the voluntary benefits system altogether. *Cf. Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible, though, for litigation about pension plans to make everyone worse off."). Congress did not intend to erect a regime "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (quoting *Varity Corp.*, 516 U.S. at 497) (alteration in original).

Notably, this Court in a related line of cases has interpreted ERISA to require a deferential standard of review for plan fiduciaries' interpretation of plan terms, emphasizing that such deference advances important congressional purposes. *See Conkright*, 559 U.S. at 516-17; *Firestone*, 489 U.S. at 111. Although these cases arose in the context of interpretation of plan terms, this Court has explained that *Firestone* deference is based "upon the same common-law trust doctrines that govern standards of fiduciary conduct." *Varity Corp.*, 516 U.S. at 514-15. As the Court explained, "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to

prevent an abuse by the trustee of his discretion." *Firestone*, 489 U.S. at 111 (quoting Restatement (Second) of Trusts § 187) (internal quotation marks omitted). In an ESOP, the plan grants the fiduciary not just the *discretion* to invest in employer securities, but the *instruction* to do so. *A fortiori*, substantial deference to the fiduciary's decision to adhere to the plan is required.

D. Insufficient Deference To ESOP Fiduciaries Would Give Rise To Unintended And Avoidable Conflicts With Securities Law.

In addition to advancing the purposes of ERISA, substantial deference to ESOP fiduciaries is necessary to avoid a collision with the federal securities laws. Congress could not have intended for an ESOP fiduciary's duties to be construed so broadly as to require them to engage in insider trading. Yet that and other anomalies are the practical effect of the Sixth Circuit's non-deferential approach to the presumption of prudence.

Respondents' theory, representative of the typical ESOP "stock drop" case, is that petitioners failed to take into account material nonpublic information about Fifth Third showing that its stock price was "artificially inflated." However, assuming petitioners possessed such information, federal securities laws would have prohibited them from taking advantage of such information by directing the Plan to sell the Fifth Third shares that the Plan already held. *See* Securities Exchange Act of 1934, §§ 10(b), 21D(b), as amended, 15 U.S.C. §§ 78j(b), 78u-4(b); 17 C.F.R. § 240.10b-5-1; *see also* 29 U.S.C. §§ 1144(a), (b)(2), (d) (ERISA preempts

state law, but not any federal law or state securities laws).

ERISA does not require a fiduciary to break the law. *Cf.* Restatement (Second) of Trusts § 166, cmt. a ("The trustee is not under a duty to the beneficiary to do an act which is criminal or tortious."). Thus, ERISA's duty of prudence does not require a plan fiduciary to engage in unlawful insider trading, no matter how beneficial the insider trading might be to the plan or the plan's participants. As the Second Circuit put it, "[t]he prudent man does not commit insider trading." *Rinehart v. Akers*, 722 F.3d 137, 147 (2d Cir. 2013). A robust presumption of prudence "gives fiduciaries a safe harbor from failing to use insider information to divest from employer stock," ensuring that they will not be sued for refusing to break the law. *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *see also Kirschbaum*, 526 F.3d at 256 (the prohibition on insider trading "reinforce[s] the conclusion that the *Moench* presumption cannot be lightly overcome").

To be sure, a fiduciary in this position could lawfully cease making *new* investments, *see* 17 C.F.R. § 240.10b-5; *Chiarella v. United States*, 445 U.S. 222, 226-27 (1980), or could disclose the nonpublic information and then divest, *see* U.S. Cert. Br. 12. But these half-measures are unworkable at best and self-defeating at worst, leading to anomalous results that deference to ESOP fiduciaries would avoid.

If a company makes an unexplained decision to bar new investments by its ESOP in its own stock, the market would have ample reason to suspect that something was wrong and to react unfavorably. Such

a reaction would put at risk the considerable number of shares *already* held by the plan.[17] Of course, the severity, timing, and duration of the market's reaction would be uncertain, but any decline in stock price could well exceed the decline that would have occurred if the material nonpublic information had been publicly disclosed. A prudent fiduciary is unlikely to take this very risky approach, and certainly a fiduciary would not be acting imprudently because she chose *not* to make such a high-stakes gamble.

The Government's suggestion of simply disclosing the information is similarly unhelpful. Since the public disclosure of negative information would result in a downward market adjustment, the post-disclosure price of the stock would no longer be "artificially inflated." As a result, any divestment would be made at the non-inflated price, and would not aid participants at all. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 350 (3d Cir. 2007). More fundamentally, the Government's approach contemplates that a company's decision to establish an ESOP will have far-reaching ripple effects on its corporate disclosures. Congress cannot have intended a law governing employee benefits to "disturb[] the carefully delineated corporate disclosure laws" in this way. *Citigroup*, 662 F.3d at 145 (citation and internal quotation marks omitted).[18]

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[17] In a typical mature plan, the number of shares of employer stock already held by the plan (as a result of investments made over a period of years) vastly exceeds the number of shares currently being acquired under the plan each year.

[18] Respondents have suggested that petitioners could have resolved this quandary by simply resigning. J.A. 88-89 (¶ 197). But they

II. Failure To Allege Facts Satisfying The Applicable Standard Of Review Under ERISA Is Fatal At The Pleading Stage.

For the reasons explained in Part I above, ERISA strictly limits the circumstances in which an ESOP fiduciary's decision to invest in employer securities can be deemed imprudent. The text of the statute, trust law, the purposes of ERISA, and the need to construe the statute in harmony with securities law all compel deferential review when a plaintiff challenges an ESOP fiduciary's decision to adhere to the terms and purpose of the plan by continuing to invest in employer stock. It follows that if a plaintiff cannot plausibly allege facts showing an entitlement to relief under this standard, the complaint must be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Put simply, if the plaintiff cannot point to the sort of extraordinary circumstances that would render continued investment in employer securities imprudent *in the context of an ESOP*, she has not "show[n] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Iqbal, like this case, involved a cause of action that accorded built-in deference to the defendant – in that

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do not explain how this would help plan participants: If petitioners did not pass along the material nonpublic information to their successors, the successor fiduciaries would not be in a position to use the information. If petitioners *did* pass along the material nonpublic information to their successors, the successor fiduciaries would be subject to the same securities-law constraints that applied to petitioners before they resigned. *See United States v. O'Hagan*, 521 U.S. 642, 650-59 (1997); *Dirks v. SEC*, 463 U.S. 646, 655 - 64 (1983).

case in the form of qualified immunity. Since entitlement to relief meant overcoming qualified immunity, plaintiffs had to "plead sufficient factual matter" to do just that, *i.e.*, show "a violation of a clearly established right." 556 U.S. at 677; *id.* ("purpose" to discriminate had to be plausibly alleged because that showing is required "[i]n the context of determining whether there is a violation of clearly established right to overcome qualified immunity"). So too here, plaintiffs were required to "plead sufficient factual matter" to show a violation of the duty of prudence as it applies to an ESOP fiduciary.

This result does not change simply because the deferential standard of review of an ESOP fiduciary's investment decisions typically is expressed as a "presumption of prudence." The term "presumption" in this context is simply a shorthand descripti n of the deferential legal standard required by ERISA: an ESOP fiduciary's decision to invest in employer securities is prudent as a matter of law, unless extraordinary circumstances exist that substantially impair the plan's purpose of furthering employee ownership.[19]

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[19] The term "presumption" has been regarded as "the slipperiest member of the family of legal terms"; scholars have identified "no less than eight senses in which the term has been used by the courts." 2 McCormick on Evidence § 342 (7th ed.) (citing Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L. Rev. 195 (1953)). Thus, as one court of appeals recently noted, use of that term to describe the deferential standard of review due ESOP fiduciaries is arguably "unfortunate." *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012). Aside from the Sixth Circuit, however, the courts of appeals have understood that the "presumption" label is simply a way of

Notably, this Court has referred to qualified immunity – which imposes a heightened standard that this Court applied at the pleading stage in *Iqbal* – as a "presumption" that is "rebuttable." *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998); *see also Owen v. City of Independence*, 445 U.S. 622, 668 (1980) (Powell, J., dissenting) ("Qualified immunity would provide presumptive protection for discretionary acts."); *Koubriti v. Convertino*, 593 F.3d 459, 466 (6th Cir. 2010) ("government officials generally enjoy a presumption of qualified immunity from civil lawsuits"); *Medina v. Cram*, 252 F.3d 1124, 1129 (10th Cir. 2001) ("The assertion of qualified immunity raises a rebuttable presumption."). Similarly, an opinion for this Court by Justice Brandeis held that "[f]acts relied upon to rebut [a] presumption" had to be "specifically set forth" in the pleadings to avoid dismissal. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935). And in corporate law, a plaintiff seeking to overcome the business judgment rule's "presumption that directors act . . . in the best interests of the company" must do so through specific allegations at the pleading stage. *In re Tower Air Inc.*, 416 F.3d 229, 238 (3d Cir. 2005); *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 285-86 (Del. Ch. 2003).[20] There is nothing

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expressing the deference accorded to ESOP fiduciaries. As long as this Court clarifies that point, there is little harm in maintaining terminology that, even if imprecise, has been a fixture of ERISA law for nearly twenty years.

[20] *See also Jacobs v. Vrobel*, 724 F.3d 217, 220-21 (D.C. Cir. 2013) (in Westfall Act cases where the Attorney General certifies the employee acted within scope of his employment, plaintiff must allege facts that would overcome this "rebuttable presumption");

talismanic about the label "presumption" that relieves plaintiffs of the need to plead facts showing an entitlement to relief under the applicable legal standard of substantive liability for ESOP fiduciaries.

The court below therefore erred in holding the presumption of prudence irrelevant at the pleading stage. It based its decision on the conclusory statement that a so-called "evidentiary presumption" is "not an additional pleading requirement." *Pfeil*, 671 F.3d at 592; Pet. App. 11-12. To be sure, some presumptions are purely evidentiary in nature; the so-called "bursting bubble" presumption operates only "to shift the burden of producing evidence with regard to the presumed fact," after which it "is spent and disappears." 2 McCormick on Evidence § 344. Other presumptions, however, impose "a heavy burden of persuasion," *id.*, and "the location of the burden of persuasion . . . determine[s] *the burden of making allegations*," Charles V. Laughlin, *In Support of the*

Del Marcelle v. Brown Cnty. Corp., 680 F.3d 887, 914 (7th Cir. 2012) (in a "class-of-one" Equal Protection case, where plaintiff alleges only that he was subject to a "subjective and individualized" decision, "[t]hat sort of accusation would not be enough to show plausibly that plaintiff will be able to rebut the presumption of rationality"); 30 C.J.S. Employer-Employee Relationship § 33 ("An employee hired without an express contract has the burden of pleading and proving an exception to the presumption of at-will employment."); 1 Fed. Proc., Lawyers' Ed. § 1:107 ("The doctrine that a prisoner must introduce more than 'unsubstantiated declarations' to rebut the presumption that he or she retains his or her preincarceration domicile relates to the ultimate burden of proof, but there is a concomitant burden of pleading – the complaint must allege facts sufficient to raise a substantial question about the prisoner's intention to acquire a new domicile.").

Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 201 (1953) (emphasis added). Moreover, presumptions "are inextricably intertwined with the pertinent substantive law," and therefore "substantive considerations have a considerable impact on the procedural effect desirable for a particular presumption." 2 McCormick on Evidence § 344.

Properly understood, *see supra* Part I, the "presumption of prudence" expresses the substantive standard a plaintiff must meet by pleadings and proof. Far from merely assigning the burden of producing facts at trial, ERISA imposes a substantive hurdle the plaintiff must surmount to establish a breach of the duty of prudence. Any other conclusion would give short shrift to the "substantive considerations" embedded in the statutory scheme. If courts were to give ESOP fiduciaries nothing more than the benefit of a weak evidentiary presumption, that result would disregard the "character and aims" of ESOPs, depart from trust law, and defeat Congress's purposes. In sum, and as every court of appeals to address the question (aside from the Sixth Circuit) has recognized, there is "no reason to allow [a] case to proceed to discovery when, even if the allegations are proven true, [the plaintiff] cannot establish that defendants abused their discretion." *Edgar*, 503 F.3d at 348-49.[21]

The Sixth Circuit also contended that the presumption could not be applied at the pleading stage because, unlike most other circuits, it has "not adopted

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[21] *See also Citigroup*, 662 F.3d at 139-40; *Kopp v. Klein*, 722 F.3d 327, 338-39 (5th Cir. 2013); *White*, 714 F.3d at 990-91; *Lanfear*, 679 F.3d at 1281.

a specific rebuttal standard," and allows plaintiffs, "having had an opportunity to conduct formal discovery, [to] come forward with rebuttal proofs of many kinds." *Pfeil*, 671 F.3d at 595. As explained above, the lower court's refusal to adopt a standard is itself error: ERISA requires plaintiffs to make the difficult showing that continuing to invest in employer securities would substantially defeat the purposes of the ESOP. *Supra* Part I. But even if the Court were to adopt some less specific standard, it is incorrect that flexible standards admitting "proofs of many kinds" cannot apply at the pleading stage. *See, e.g.*, *Matrixx Initiatives v. Siracusano*, 131 S. Ct. 1309, 1322-23 (2011) (conducting a detailed review of pleadings to determine whether a complex set of factual allegations, if true, would satisfy the general "materiality" standard).[22]

III. Respondents Have Not Stated A Claim For Breach Of The Duty Of Prudence.

When measured against the correct legal standard, respondents' pleadings cannot survive a motion to dismiss. The gravamen of their complaint is that the price of Fifth Third stock – like the stock market generally during the financial crisis – declined, and

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[22] The Sixth Circuit also relied on the "plain language" of its earlier opinions saying the presumption could be rebutted "by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Pfeil*, 671 F.3d at 592-93 (emphasis in original) (internal quotation omitted). Although the court appears to have viewed a "showing" as something that cannot occur at the pleading stage, the exact requirement of the Federal Rules is to allege facts "*showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added).

petitioners knew or should have known that these losses arising from Fifth Third's loan portfolio were on the horizon. J.A. 36-37, 87 (¶¶ 50, 190). In respondents' view, the only prudent course of action for petitioners in this circumstance was to disregard the Plan's express requirement that its ESOP component remain invested "primarily in shares of common stock of Fifth Third Bancorp." J.A. 350-51 (Plan, art. 7.4(a)). At bottom, respondents' theory is that petitioners were "required to depart from the Plan's directives regarding [Fifth Third stock] just because they were aware that the stock price would likely fall." *Lanfear*, 679 F.3d at 1282.

These allegations fall far short of what is necessary to state a claim for breach of the duty of prudence by an ESOP fiduciary. Respondents have alleged no facts that would plausibly show that continued investment would substantially impair the Plan's fundamental purpose, *i.e.*, employee ownership of Fifth Third stock. Their allegations do not show, for example, that employees' interest in building long-term shares in their employer would be thwarted by an impending collapse of the company. To the contrary, Fifth Third's substantial recovery had already begun during the class period. In short, if every one of the facts alleged in the complaint were true, they still could not establish entitlement to relief under the deferential standard of review owed to ESOP fiduciaries.

Participation in an ESOP comes with trade-offs. As Congress recognized, there are important advantages – the opportunity to build a stake in one's employer and share in its long-term success. Tax Reform Act of 1976, § 803. Congress was also well aware of the

disadvantages – exposure to "the risk of large losses" inherent in any undiversified fund. 29 U.S.C. § 1104(a)(1)(C). Fifth Third employees for whom this downside risk was unacceptable had the freedom to transfer all or any part of their investment in the ESOP to another fund that was not part of the ESOP. J.A. 576-77 (Plan, Seventh Amendment art. 7.3). Those who remained invested in the ESOP (and therefore in the company), and those who continued to invest in the ESOP and the company, shared with other stockholders in the losses of the financial crisis; now they are sharing with other stockholders in the gains of Fifth Third's rebound. Throughout, petitioners followed the express terms of the Plan. Absent extraordinary circumstances showing that this course of action had become manifestly inconsistent with the Plan's purpose of building employee ownership – and respondents allege none – petitioners satisfied the duty of prudence. Accordingly, respondents' claim for breach of that duty must be dismissed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething &
Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Robert A. Long, Jr.
John M. Vine
David M. Zionts
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

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APPENDIX

STATUTORY APPENDIX

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29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and

the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer

real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

* * *

29 U.S.C. § 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of--

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

* * *

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

* * *

(d) Definitions

For purposes of this section--

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying

employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

* * *

(5) The term "qualifying employer security" means an employer security which is--

(A) stock,

(B) a marketable obligation (as defined in subsection (e) of this section), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of Title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfies the requirements of subsection (f)(1) of this section.

(6) The term "employee stock ownership plan" means an individual account plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

* * *

29 U.S.C. § 1108. Exemptions from prohibited transactions

* * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * *

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if–

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

* * *

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if--

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer

securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

* * *

Tax Reform Act of 1976, Pub. L. No. 94-155, § 803

* * *

(h) Intent of Congress Concerning Employee Stock Ownership Plans.— The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, the Employee Retirement Income Security Act of 1974, the Trade Act of 1974, and the Tax Reduction Act of 1975) and this Act has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. Because of the special purposes for which employee stock ownership plans are established, it is consistent with the intent of Congress to permit these plans (whether structured as pension, stock bonus, or profit-sharing plans) to distribute income on employer securities currently.

* * *

RESPONDENT'S BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, ET AL.,
Petitioners,

v.

JOHN DUDENHOEFFER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY MCKENNA & EGLESTON
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

RONALD J. MANN
Counsel of Record
435 West 116th Street
New York, NY 10027
(212) 854-1570
rmann@law.columbia.edu

MAURICE R. MITTS
MITTS LAW, LLC
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0112

February 26, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The complaint in this case alleges a breach of the fiduciary duties of loyalty and prudence, in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), by the trustees of an employee pension benefit plan that invests in the stock of the employer. The question before the Court is whether those allegations are inadequate on their face unless they establish that the employer's financial status is dire.

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Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)	*passim*
Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559 (1985)	13-14
Donovan v. Bierwith, 680 F.2d 263 (2d Cir. 1982)	41, 42
Erickson v. Pardus, 551 U.S. 89 (2007)	23
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LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008)	19, 44
Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984)	42
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Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008)	40, 41
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TABLE OF AUTHORITIES—Continued

Page(s)

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) 28, 29

Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) 42

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 2

Varity Corp. v. Howe, 516 U.S. 489 (1996) 3, 22, 49

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26 U.S.C. § 401(k) 5, 44

29 C.F.R. § 2550.407d-6(a) 5

Bankruptcy Code § 1129(b)(2)(A), 11 U.S.C. § 1129(b)(2)(A) 29

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* .....*passim*

§ 2(a), 29 U.S.C. § 1001(a) 2

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§ 204(j), 29 U.S.C. § 1054(j) 5

§ 404, 29 U.S.C. 1104 .....*passim*

§ 404(a), 29 U.S.C. § 1104(a) .....*passim*

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§ 404(a)(1), 29 U.S.C. § 1104(a)(1) ... 22, 26, 27, 31
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TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES **Page(s)**

Dealbook, *Ford Plans to Repay $4 Billion in Debt*, June 30, 2010, *available at* http://dealbook.nytimes.com/2010/06/30/ford-plans-to-repay-4-billion-in-debt/?_php=true&_type=blogs&_r=0 (last visited Feb. 24, 2014) 44

Fifth Third Bancorp, Form 10-K, Ex. 99: The Fifth Third Bancorp Master Profit Sharing Plan (2008), *available at* http://www.sec.gov/Archives/edgar/data/35527/000119312508142275/dex99.htm (last visited Feb. 24, 2014)..... 23

Daniel Fischel and John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988)..... 19, 44

GORDON P. GOODFELLOW & SYLVESTER J. SCHIEBER, *Investment of Assets in Self-Directed Retirement Plans*, in POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY (Michael S. Gordon et al. eds., 1997)..... 43

H.R. Rep. No. 93-533, 93rd Cong., 2nd Sess. (1973) 2, 19

Honeywell Pension Move, N.Y. Times, Dec. 31, 2002, *available at* http://www.nytimes.com/2002/12/31/business/honeywell-pension-move.html?pagewanted=print (last visited Feb. 24, 2014) 43-44

TABLE OF AUTHORITIES—Continued

Page(s)

John J. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996) 35

3 Leg. History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 67 (Comm. Print 1976)..... 1, 3

Richard A. Oppel, Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. Times, Nov. 22, 2001, at A2 48

Restatement (Second) of Trusts (1957) 17, 20

Restatement (Third) of Trusts (2007) .....*passim*

S. Rep. No. 93-127, 93rd Cong., 2nd Sess. (1973) .....*passim*

IIA Austin W. Scott & William F. Fratcher, Scott on Trusts (4th ed. 1987)..... 34

Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815 (2004) 48

Uniform Law Commission, *Legislative Fact Sheet – Trust Code*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited Feb. 24, 2014).. 17

Uniform Law Commission, Uniform Trust Code (2000) 17, 20

TABLE OF AUTHORITIES—Continued

Page(s)

W.R. Grace & Co., *Grace Announces Sale of Shares by the Grace 401k Plan* (Apr. 12, 2004, *available at* http://www.grace.com/media/NewsItem.aspx?id=513545 (last visited Feb. 24, 2014) 44

Mary Williams Walsh, *Pension Shift at Northwest Raises Fears*, N.Y. Times,Apr. 5, 2003, *available at* http://www.nytimes.com/2003/04/05/business/pension-shift-at-northwest-raises-fears.html?pagewanted=all&src=pm (last visited Feb. 24, 2014) 44

Peter J. Wiedenbeck, ERISA: Principles of Employee Benefit Law (2010) 17, 18

Peter J. Wiedenbeck, *Trust Variation and ERISA's Misbegotten "Presumption of Prudence,"* forthcoming TAX NOTES (Mar. 2014) 35, 36, 45

BRIEF FOR RESPONDENTS

INTRODUCTION

In a case interpreting the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 *et seq.*), the title of the statute should be enough to demonstrate the centrality of employee retirement income to the statute's intended operations. But petitioners' careful delineation of Congress' intermittent attention to the issue of employer stock ownership portrays the protection of employees as just one of several factors that bear a general relation to ERISA. Indeed, petitioners elevate the interest in employer stock ownership almost entirely over the interests of employees. Specifically, they read ERISA to excuse the fiduciaries of funds that own employer stock from any obligations of loyalty or prudence unless the employer is on the brink of insolvency. Because that perspective (and petitioners' presentation) largely ignores the statute on which this case turns, a few introductory words about ERISA's structure and effects are appropriate.

Contrary to petitioners' portrayal of ERISA as a statute focused on employer interests, ERISA was driven by the problems of employees and enacted to provide a vigorous federal protection for employees. In the view of its drafters and proponents, the statute was "possibly the most important single piece of legislation to assist the American worker in nearly 40 years." 3 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 67 (Comm. Print 1976) [hereinafter 3 ERISA Leg. Hist.]. As this Court well knows, "ERISA is a

comprehensive statute designed ***to promote the interests of employees and their beneficiaries*** in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983) (citation omitted) (emphasis added).

The centrality of employee interest is not something to be teased from obscure committee hearings or statements for the *Congressional Record* that presumably went unheard by most of those who voted for the statute. It appears not only in the name of the statute itself; it pervades the statute's own description of itself. Thus, the opening words of ERISA state that because "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit plans], they are affected with a national public interest." ERISA § 2(a), 29 U.S.C. § 1001(a). The opening paragraph of the statute goes on to specify the particular risk to employee welfare that motivated the statute: concerns about "the soundness and stability of plans" and the consequent likelihood that beneficiaries would be "deprived of anticipated benefits." *Id.*

ERISA was far from Congress' first response to self-dealing and imprudence in the management of employee benefit plans. Rather, the House Report explained, "[e]xperience * * * has demonstrated the inadequacy of [previous enactments that were] wholly lacking in substantive fiduciary standards." H.R. Rep. No. 93-533, 93rd Cong., 2nd Sess. 4 (1973) [hereinafter ERISA House Report]. As this Court has put it, "[o]ne of Congress' central purposes in enacting this complex legislation [*i.e.*, ERISA] was to prevent the 'great personal tragedy' suffered by employees'" under the less effective regulatory regimes and common law systems theretofore in existence. *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374 (1980)

(quoting 3 ERISA Leg. Hist., *supra*, at 12). Thus, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress' strategy for remedying the situation is explicit on the face of the statute, which delineates "the policy of [ERISA] to protect * * * the interests of participants in employee benefit plans and their beneficiaries, * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

The centerpiece of that policy was the adoption of federal duties of loyalty and prudence in ERISA § 404, 29 U.S.C. 1104. The duty of loyalty obligates fiduciaries to "discharge [their] duties with respect to a plan ***solely in the interest of*** the participants and beneficiaries and * * * ***for the exclusive purpose of*** * * * providing benefits to participants and their beneficiaries; and * * * defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

In addition to a federally mandated duty of loyalty, Congress also adopted a "new and stringent" standard for assessing the conduct of fiduciaries, S. Rep. No. 93-127, 93rd Cong., 2nd Sess. at 2 (1973) [hereinafter ERISA Senate Report], which ERISA denotes as the "[p]rudent man standard of care," ERISA § 404(a), 29 U.S.C. § 1104(a). That duty obligates the fiduciary to use "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such

matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). The Senate Report emphasized "the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." ERISA Senate Report, *supra*, at 13.

The third leg of the statutory strategy includes an explicit private right of action designed to ensure vigorous private enforcement of the new federal duties. Specifically, ERISA § 409(a), 29 U.S.C. § 1109(a) makes "a fiduciary * * * personally liable to make good * * * any losses to the plan," and Section 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes "a civil action * * * by a * * * beneficiary * * * for appropriate relief."

STATEMENT

1. Petitioner Fifth Third Bancorp ("Fifth Third") is a bank holding company with operations in a number of States. This case concerns the Fifth Third Stock Fund, which is one of the investment choices available to participants in the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"). The Plan is a "defined contribution" retirement plan that Fifth Third sponsors for its employees. *See* ERISA § 3(34), 29 U.S.C. § 1002(34); Pet. App. 4. The introduction to the Plan documents the Plan's central aim unambiguously: "The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries." J.A. 284.[1]

---

[1] The Plan's own description of its purpose is in considerable tension with petitioners' frequent description of the sole

The Fifth Third Stock Fund is designed to be an employer stock ownership plan ("ESOP") and an eligible individual account plan ("EIAP"). *See* ERISA § 407(d)(3)(A), 29 U.S.C. § 1107(d)(3)(A).[2] Under the Plan, participants may specify that a portion of their salaries be contributed to the Plan. Because it is a so-called "401(k)" plan, they also may select a specific investment from a group of options established by the Plan fiduciaries. *See* Pet. App. 4; J.A. 123-33, 140-43 (summary of Plan provisions regarding contributions and selection of investments); *see also* 26 U.S.C. § 401(k).

In the first instance, all employer contributions are made initially into the Fifth Third Stock Fund, which "is invested primarily in shares of common stock of [Fifth Third]." J.A. 141, J.A. 350-51. If employees wish to do so, they have the option, after the employer makes contributions into the Fifth Third Stock Fund, to move those contributions into other investment choices available under the Plan.[3] J.A. 141, J.A. 576-77.

"purpose" of such plans as fostering long-term investment in the employer. *E.g.*, Petitioners' Br. 20, 34, 46.

[2] Importantly, the retirement Plan as a whole is not an ESOP, because it has investment options that do not involve employer stock. Department of Labor regulations provide that if a portion of a plan invests in employer stock, that portion is to be treated as an ESOP. 29 C.F.R. § 2550.407d-6(a); *see* Brief for the United States as Amicus Curiae (responding to this Court's invitation) at 4 n.1. It is for that reason also an EIAP.

[3] It is not an accident of generosity on the part of Fifth Third that employees have the option to move their pensions out of Fifth Third stock. *See* ERISA § 204(j), 29 U.S.C. § 1054(j) (requiring employers to grant employees that option).

2. Fifth Third traditionally was a diversified financial services holding company. Confronted by the popularity of subprime mortgages in the early years of this century, Fifth Third began to lower its underwriting standards to permit it to participate in that market.[4] It also began to offer a variety of novel mortgage products characteristic of the subprime mortgage industry. Predictably, the shift in underwriting standards and product design led to increased rates of default. By 2005, industry observers had begun to express concerns that the combination of relaxed lending practices and rising defaults posed risks for the stability of subprime lenders. As the problems with the industry accelerated and deepened, more than two dozen subprime mortgage lenders had failed by the early months of 2007. In the case of Fifth Third in particular, its involvement in the industry had caused it severe structural problems. The shift in business practices, and resulting instability, made Fifth Third a much different (and more unstable) investment than it had been at the time the Plan was formed. J.A. 43-51, 55-57.

3. Despite those problems with the industry and with Fifth Third itself, neither Fifth Third nor the other fiduciaries responsible for the Plan investigated the propriety of continued investments by the Plan in Fifth Third stock. Rather, Fifth Third and the other fiduciaries offered to the market incomplete and inaccurate statements, which had the twin effects of assuaging market concerns and causing artificial

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[4] The factual setting that the Statement elaborates relies heavily on the Consolidated Amended Class Action Complaint (the "Complaint"); because the case involves the propriety of granting a motion to dismiss, we treat the allegations in the Complaint as true and accurate. *See* J.A. 15-282.

inflation of the price of Fifth Third stock. J.A. 57-79 (specific allegations of more than a dozen false statements). Indeed, even as exigent circumstances caused the price of the stock to decline, petitioners continued to invest respondents' pension funds in Fifth Third stock and took no steps to divest the Fifth Third Stock Fund of any of the shares of the stock it already held. The failure of petitioners to investigate or otherwise respond caused the participants in the Fifth Third Stock Fund (which owned more than one hundred million dollars of Fifth Third stock), to suffer massive and entirely predictable losses, including a 74% decline in the value of the Fifth Third stock the fund held. J.A. 52-55, 80-88.

4. Respondents filed a complaint in August of 2008, alleging (among other things) that the actions of petitioners as fiduciaries of the Plan violated the duties imposed on them by Section 404 of ERISA[5]; the Complaint at issue was filed in September of 2009. J.A. 15-282. Among other things, the Complaint alleges that petitioners were aware of the dire circumstances facing Fifth Third, but failed to take any action to protect participants from losses, that petitioners did not consult with independent fiduciaries regarding appropriate measures to take in order to serve the interests of the participants of the Plan, and did not resign though they could not loyally serve the Plan. J.A. 88-89.

The Complaint details the conflicts of interest between the duty of petitioners to act solely in the interests of the participants and the incentives

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[5] The Complaint also alleged breaches of the co-fiduciary obligations of ERISA § 405, 29 U.S.C. § 1105, by all of the petitioners, but those claims are not directly at issue here.

petitioners had to further their own interests (including the interests of Fifth Third). J.A. 89-92. The Complaint also alleges that the conflicting incentives of petitioners impelled them to take disloyal and imprudent actions that caused devastating losses for participants in the Plan. J.A. 88. Finally, the Complaint alleges that petitioners' failure violated petitioners' duties of loyalty and prudence under ERISA § 404(a), 29 U.S.C. § 1104.

5. The district court dismissed the Complaint in November of 2010. Pet. App. 28-54. Applying the so-called *Moench* presumption (articulated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)), the court reasoned that the failure to allege a "dire financial predicament" required dismissal. Pet. App. 45.

6. A unanimous panel of the court of appeals reversed. Pet. App. 1-27. The court drew its standard for assessing the allegations of the Complaint from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), considering whether the Complaint "contain[ed] sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Pet. App. 7 (quoting *Iqbal*, 556 U.S. at 678) (internal brackets and quotation marks omitted). The court emphasized the specific "enumerat[ion]" of information that should have led petitioners to investigate the exposure of the Plan to the stock of Fifth Third, and the allegations that petitioners' knowledge of the relevant events made continued investment in company stock imprudent. Pet. App. 13-14. Accordingly, the court reversed, concluding that the Complaint adequately stated a claim for relief under ERISA. Pet. App. 15, 23-24.

7. Petitioners sought rehearing and rehearing en banc, but the court of appeals denied that request without opinion or dissent. Pet. App. 55-56.

8. Petitioners then filed a petition for a writ of certiorari, which this Court granted (as to question 1) on December 13, 2013.

SUMMARY OF ARGUMENT

Petitioners present a case for the exercise of grand judicial decision making, balancing the incommensurate interests of employees in sound investment of their retirement assets against the interests of employers in having their employees invest in employer stock. From that balancing, petitioners derive a substantive rule that the ERISA fiduciary duties apply to plans that own employer stock only when the employer is in dire financial circumstances. But the case presents no occasion for free-floating judicial balancing of unanchored statutory objectives. Three points resolve the entire case.

1. First, Congress articulated the relevant legal standard in ERISA, which requires prudent management of the Plan "solely in the interest of" the beneficiaries and for their "exclusive" benefit, without regard for any conflicting interests of the employer. Because the Complaint plausibly describes disloyal and imprudent actions by petitioners that harmed respondents, it states a cause of action for breach of ERISA § 404.

2. Second, because Congress already has specified ERISA's accommodation of the interest of pension plans investing in employer stock, there is no occasion for this Court to erect a judicial superstructure of additional accommodations for those plans. ERISA § 404(a)(2) explicitly limits the exception for plans that own employer stock to the fiduciary duties related to diversification, on which respondents do not rely. Because ERISA § 404(a)(2) does not exclude the duties

of loyalty and prudence, those duties apply to funds that own employer stock with full force.

The aspirational references in ERISA § 404(a)(1)(B) calling for attention to the management of trusts of "like" aims do not justify a bright-line rule that exempts fiduciaries of retirement plans that own employer stock from the duties of loyalty and prudence that ERISA § 404(a)(2) preserves for them. Among other things, that narrow reading of the duty imposed by paragraph (a)(1)(B) renders paragraph (a)(2) superfluous and provides no justification at all for a limitation on the duty of loyalty.

Nor should it alter the result if a plan provides for investment in employer stock. ERISA §§ 404(a)(1)(D) and 410(a) obligate fiduciaries to ignore plan provisions that are inconsistent with their fiduciary duties. In any event, the Plan in this case explicitly requires the fiduciaries to engage in ongoing monitoring of the prudence of the Plan's investments. Furthermore, nothing in the Plan documents even purport to prohibit the fiduciaries from providing truthful and accurate information regarding Plan investments to the beneficiaries; petitioners indisputably could have provided truthful information without deviating from the Plan.

Finally, even if ERISA had not required the fiduciaries to ignore the terms of the Plan, and even if the Plan directly prevented responsive action, commonplace principles of trust law would require the trustees to deviate from the written terms of the Plan to protect the beneficiaries.

3. Third, none of the problems that enforcement of ERISA poses for Fifth Third can excuse disloyal or imprudent conduct by fiduciaries. The legal standard

in all cases should ask what a non-conflicted, loyal, and prudent fiduciary would have done under the circumstances. The Complaint alleges that such a fiduciary could have taken three steps: gathering and disseminating information, ceasing investments in Fifth Third stock, and shifting investments out of Fifth Third stock. The first of those required no deviation from the Plan and well might have mitigated the losses to the beneficiaries by motivating them to accelerate transfers of their investments into parts of the Plan that did not own Fifth Third stock.

The second and third steps would have required a change in the Plan's investment practices, but nothing in ERISA suggests that is problematic. Indeed, the Plan explicitly authorized those kinds of changes. J.A. 735 (Trust Agreement § 3.3(a)). The relevant question should be how a non-conflicted, loyal, and prudent fiduciary would have responded. If such a fiduciary would have altered the Plan's investment practices, respondents are entitled to no less.

We recognize that the relations between the fiduciaries and Fifth Third make the dissemination of information or changes in investment strategy more problematic than it would have been if the Plan were managed by professional independent fiduciaries. But it was Fifth Third that chose corporate insiders to manage the Plan that holds its employees' investments. If anything, that choice suggests a *more* stringent standard of review, not a *less* stringent standard.

Nor is it relevant that enforcement of ERISA duties could lead to the filing of class actions when disloyal and imprudent conduct harms the value of employee retirement funds. If the pleading standards are too lax, Congress can step in, as it has done in other

contexts. But no plausible pleading standards would justify dismissal of the Complaint in this case, which includes a detailed and specific delineation of conduct and events that directly tracks the relevant provisions of ERISA.

At bottom, petitioners' argument reduces to the idea that the interests in employee stock ownership justify a bright-line exception from ERISA's fiduciary duties. Specifically, petitioners argue that fiduciaries of an ERISA plan that invests in employer stock have no fiduciary duties to the employees *unless* the employer is in dire financial circumstances. The language, structure, and context of ERISA preclude the judicial articulation of any such exception.

ARGUMENT

I. Because The Complaint Plausibly Describes Disloyal and Imprudent Conduct That Harmed Respondents, It States A Cause of Action Against Petitioners Under ERISA §§ 404 and 502.

Petitioners contend that Congress' solicitousness for employee investment in employer stock almost entirely outweighs the interests of employees in having their pensions managed by loyal and prudent fiduciaries. Specifically, petitioners contend that the statute creates a "substantive hurdle" (Petitioners' Br. 49) that requires dismissal of any complaint against an ERISA plan that requires investments in employee stock unless the employer is in "dire" financial circumstances. *See* Petitioners' Br. 50-52.[6] Thus, to

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[6] Although petitioners in their brief on the merits retreat from the common reference to "dire" circumstances in the petition (*e.g.*, Pet. 17), we do not discern any difference between that standard

put it directly, petitioners argue that fiduciaries of an ERISA plan that invests in employer stock owe no enforceable fiduciary duties *unless* the employer is in dire financial circumstances.[7] A straightforward review of ERISA and well-settled principles of pleading shows the fallacy of that perspective.

A. Section 404 of ERISA Imposes a Mandatory Federal Duty of Loyalty and Prudence on the Fiduciaries of Plans Covered by ERISA.

This case begins and ends with the language Congress has chosen in the relevant provisions of ERISA, which explicitly describe the elements of the causes of action pleaded in the Complaint. As this Court is well aware, Congress has imposed on the fiduciaries of ERISA plans "strict standards of trustee conduct, * * * most prominently, a standard of loyalty and a standard of care," *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570

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and the somewhat less uniform references in their brief on the merits to "extraordinary circumstances, such as a serious threat to the employer's viability," Petitioners' Br. 16, to "a serious threat to the company's ongoing viability," Petitioners' Br. 17, to "a serious threat to the continued viability of the company," Petitioners' Br. 28, or to "a serious threat to the company's viability as an ongoing concern," Petitioners' Br. 34 (citation and internal quotation marks omitted). Our brief uses "dire" financial distress as a shorthand substitute for the amorphous standard that petitioners articulate.

[7] We have not conceded that Fifth Third was not in "dire" financial circumstances, whatever that might mean. *See, e.g.*, J.A. 83 (discussing Fifth Third's borrowing $3.4 *billion* from the government's TARP fund). We do not discuss the point because it is in our view irrelevant to the proper legal analysis of the Complaint.

(1985). To be specific, ERISA provides in relevant part:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise with like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

> (2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

ERISA § 404(a), 29 U.S.C. § 1104. We present the language in detail because of our abiding conviction that attention to the specific boundaries of the language Congress chose is all that is needed to resolve this matter.

1. ERISA Section 404(a)(1)(A) imposes a mandatory federal duty of loyalty.[8] ERISA § 404 is clear and

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[8] Petitioners' brief on the merits discusses the duty of prudence much more extensively than it does the duty of loyalty. But the duty of loyalty is an important part of respondents' answer to the question that petitioners drafted, on which the Court granted review ("Whether * * * Respondents were * * * required * * * to plausibly allege in their complaint that the fiduciaries * * * abused their discretion * * * in order to overcome the presumption that their decision to invest in employer stock was reasonable"). Pet. i. As the discussion below demonstrates, the allegations of disloyalty in the Complaint are adequate to overcome any such presumption. Moreover, because the allegations related to the duties of loyalty and prudence are intertwined in this case, it would be artificially constricted to consider one without the other.

In any event, respondents' allegations of disloyal conduct are before the Court, being directly validated by the decision below, criticized in the petition, and offered in the brief in opposition to support the judgment below:

straightforward. Its opening sentence states that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

The text is broad and unambiguous. Of relevance to this case, it explicitly prohibits actions by fiduciaries designed to further the interests of an employer, as opposed to the employee beneficiaries of the plan. The employer's interests surely are advanced by a plan in which its employees invest in its stock, but those interests can have no place in the activities of a

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- When the court of appeals upheld Count I of the Complaint, Pet. App. 25, it upheld a claim seeking relief for "Failure to Prudently and Loyally Manage the Plans' Assets," J.A. 97.
- The body of the petition repeatedly criticizes the Sixth Circuit's analysis of the duty of loyalty. Pet. 9 (discussing Pet. App. 12-13) (contending that the Sixth Circuit's "standards of prudence and loyalty" had not been applied by any other circuit); Pet. 21 (discussing Pet. App. 12-13) ("The court of appeals went * * * further than Congress or any circuit has ever gone, when it declared that [ESOP fiduciaries] are now subject to identical standards of prudence and loyalty.") (citations and internal quotation marks omitted); Pet. 23 (arguing that Sixth Circuit "impermissibly disregarded the ESOP-specific exemptions when it * * * impose[d] identical standards of prudence and loyalty") (citations and internal quotation marks omitted) (emphasis omitted).
- The brief in opposition repeatedly emphasized the distinction between the duty of loyalty and the duty of prudence. *E.g.*, Br. in Opp. 3, 24, 27.

fiduciary acting "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of" providing benefits. If the word "exclusive" is to have any meaning in this context, it must "exclu[d]e" the interests of employers from the concerns of the ERISA-loyal fiduciary.[9]

The Restatement (Third) of Trusts recognizes a similar (albeit narrower) duty: "Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries * * *." Restatement (Third) of Trusts § 78(1) (2007).[10] Importantly, the ERISA duty is even more categorical than the common-law duty. Where the Restatement duty can be cabined by alternative "provi[sions] in the terms of the trust," the ERISA duty is absolute: "Except as provided in sections [that do not relate to the duty of loyalty],[11] any provision in an

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[9] *See* Peter J. Wiedenbeck, ERISA: Principles of Employee Benefit Law 125 (2010) [hereinafter Wiedenbeck, ERISA Principles] (characterizing the breadth of the duty of loyalty as a "momentous discrepancy between the obligations of private trustees and employee benefit plan fiduciaries").

[10] The Restatement (Second) of Trusts, which was promulgated in 1957 (before the enactment of ERISA), includes a similar duty in § 170. The Uniform Trust Code (first promulgated in 2000) includes a similar duty in § 802. More than half of the States have adopted the Uniform Trust Code. *See* Uniform Law Commission, *Legislative Fact Sheet – Trust Code*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited Feb. 24, 2014).

[11] The permitted exculpatory provisions in ERISA § 410(a) relate to the obligations of co-fiduciaries and multiple investment managers responsible for the same plan and generally specify the permitted allocation of liability among those individuals. ERISA § 405, 29 U.S.C. § 1105. Exceptions to the prohibition on exculpation also appear in ERISA § 410(b), which permits certain

agreement or instrument which purports to relieve any fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." ERISA § 410(a), 29 U.S.C. § 1110(a); *see also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (obligating fiduciaries to comply with plan terms only "insofar as [they] are consistent" with ERISA).[12]

The comments to the Restatement emphasize that the "duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships." Restatement (Third) of Trusts, *supra*, § 78 cmt. a. The comments explicitly address the particular issue of loyalty relevant to the Complaint in this case:

> *f. Actions serving the interests of third persons or non-trust objectives.* In administering a trust the trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust. Thus, it is improper for the trustee to [act] for the purpose of benefiting a third person (whether or not a party to the transaction) rather than the trust estate or for the purpose of advancing an objective other than the purposes of the trust.

Restatement (Third) of Trusts, *supra*, § 78 cmt. f.

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types of insurance that covers potential liability under ERISA. ERISA § 410(b), 29 U.S.C. § 1110(b).

[12] *See generally* Wiedenbeck, ERISA Principles, *supra*, at 124-25 (discussing distinction between ERISA bar on exculpation and common-law rules permitting it).

The problem of disloyal pension fund trustees was not purely hypothetical. Rather, this was "[a] crucible of congressional concern," *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008) (citations and internal quotation marks omitted). Congress had a long history of attention to that problem, dating to specific and notorious examples of self-interested looting of pension funds, which extensive investigative hearings publicized in the 1950's and 1960's. *See, e.g.*, ERISA House Report, *supra*, at 1 (discussing the 1962 amendments to the Welfare and Pension Plans Disclosure Act to address "malfeasance and improper activities by pension administrators, trustees, [and] fiduciaries"); Daniel Fischel and John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1110 (1988) (discussing specific examples of fiduciary looting).

A strict duty of loyalty is inherent in the structure of trusts. As Fischel and Langbein explain,

> The logic of imposing relatively strict fiduciary duties upon the trustee, especially the stringent duty of loyalty, follows directly from the distinctive character of the trust relationship. The trust is frequently used as a governance mechanism in situations in which * * * there is a risk that the beneficiaries may be * * * unsuited to administer the property.
>
> The strict fiduciary duties of trust law act as substitutes for monitoring by the directly interested parties. The duty of loyalty is prophylactic; its purpose is to deter the trustee from engaging in self-interested conduct at the expense of the beneficiaries.

Fischel & Langbein, 55 U. CHI. L. REV. at 1114.

In sum, a fiduciary violates ERISA's duty of loyalty when its administration of the plan reflects concern for the interests of the employer, as opposed to acting "solely" and for the "exclusive" benefit of the beneficiaries and participants.

2. ERISA Section 404(a)(1)(B) imposes a mandatory federal duty of prudence. The next paragraph of ERISA imposes a duty of prudence that is no less expansive. Specifying the "prudent man standard of care" described in the title to the Section, ERISA obligates a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

As with the duty of loyalty, Congress drew the duty of prudence directly from common principles of trust law. Thus, the Restatement (Third) of Trusts obligates the trustee "to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts, *supra*, § 77(1).[13] It goes on to explain that the duty of prudence "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy." Restatement (Third) of Trusts, *supra*, § 90(a).

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[13] The Restatement (Second) of Trusts, which was promulgated in 1957 (before the enactment of ERISA), includes a similar duty in §§ 174 (prudent administration) and 227 (prudent investment). The Uniform Trust Code (first promulgated in 2000) includes a similar duty in § 804.

In sum, it is a violation of ERISA's fiduciary duties when a fiduciary fails to take or consider action with the appropriate level of diligence and care, given the specific facts and circumstances of the trust known to the fiduciary at the time.

B. The Complaint Plausibly Describes Disloyal and Imprudent Conduct, Committed by Petitioners to the Detriment of Respondents, in Violation of Section 404 of ERISA.

1. A complaint satisfies Federal Rule of Civil Procedure 8 if it plausibly describes conduct that includes each element of the cause of action. Assessing the adequacy of the allegations of the Complaint calls for a similarly routine application of settled principles, which this Court has summarized repeatedly in recent years. The basic rule, reflected in FED. R. CIV. P. 8(a)(2), is that the complaint must include a "short and plain statement of the claim showing the pleader is entitled to relief." "'[D]etailed factual allegations'" are not necessary, but the Rule does "deman[d] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The Court's recent decisions reflect a struggle with two types of challenging cases under Rule 8 – complaints that allege the elements of a claim, but not facts to support the existence of the elements; and complaints that are adequate if read literally, yet implausible on their face. *See Iqbal*, *supra*, 556 U.S. at 678 (describing "[t]wo working principles that underlie our decision in *Twombly*"). Neither problem is present here.

(a) On the first issue, it is plain that "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, *supra*, 556 U.S. at 678 (quoting *Twombly*, *supra*, 550 U.S. at 555); *see Iqbal*, *supra*, 556 U.S. at 678 (rejecting "'naked assertion[s]' devoid of 'further factual enhancement'" (quoting *Twombly*, *supra*, 550 U.S. at 557). But the 287-paragraph Complaint before the Court (J.A. 15-282) provides much more than that.

First, with regard to the duty of loyalty, the Complaint presents a series of facts that document a conflict of interest between petitioners and their duty to respondents – specifically the close financial and employment relations between the individual petitioners and Fifth Third itself. Among other things, the Complaint describes the roles some of the petitioners have on the board of directors of Fifth Third, the stock awards given to some of the petitioners, and the system basing compensation of other petitioners on maintenance of the price of Fifth Third's stock. J.A. 89-92.

The Complaint also alleges that petitioners acted on that conflict in ways that harmed respondents. The Complaint specifically documents a shift in the riskiness of the investment, which the employees could not reasonably have expected or anticipated; it also identifies more than a dozen false, misleading, and incomplete statements that petitioners made to respondent. J.A. 57-79; *see Varity Corp.*, *supra*, 516 U.S. at 506 ("lying is inconsistent with the duty of loyalty * * * codified in section 404(a)(1) of ERISA") (brackets, citation, and internal quotation marks omitted). The Complaint goes on to allege that despite knowledge that put them in a position to protect respondents, petitioners chose not to act to protect the

retirement savings of respondents, apparently elevating their own interests over the interests of respondents. J.A. 55-57, 98-105. Finally, the Complaint identifies a specific monetary loss that flowed from the misconduct it describes. JA 80-88, 105, 113.

The allegations regarding prudence are similarly specific, largely overlapping the allegations related to loyalty. Among other things, the Complaint outlines the increasing financial distress of Fifth Third and alleges that the individual petitioners were aware (or should have been aware) of those problems, which led to the price of Fifth Third stock being substantially overvalued. J.A. 55-57. As explained above, the Complaint also alleges that the individual petitioners did not respond to the situation with the diligence and attention characteristic of a prudent manager of an investment of this magnitude (more than $100 million, out of a total in the Plan of approximately $1 billion). J.A. 55-57, 98-105; *see* Ex. 99 to Fifth Third Form 10-K at 10-11 (2008).[14] Finally, the Complaint identifies a specific monetary loss that flowed from the misconduct it describes. J.A. 80-88, 105, 113.

In sum, there is no basis for suggesting that the Complaint fails to put Fifth Third on "'fair notice'" of the allegations against it, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, *supra*, 550 U.S. at 555). Whatever criticisms petitioners have leveled at the Complaint, they cannot reasonably suggest that the Complaint is limited to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Iqbal*, *supra*, 556 U.S. at 678 (quoting *Twombly*, *supra*, 550 U.S. at 555).

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[14] *Available at* http://www.sec.gov/Archives/edgar/data/35527/000119312508142275/dex99.htm (last visited Feb. 24, 2014).

(b) It is even harder to suggest that the Complaint fails to move "across the line from conceivable to plausible," *Iqbal*, *supra*, 556 U.S. at 680 (quoting *Twombly*, *supra*, 550 U.S. at 570). The allegations are detailed and specific, relying for the most part on indisputable matters of public record. Indeed, what makes the allegations so plausible is that they tell such a conventional and coherent story of the effects of conflicting interests on human action: individual defendants placed by their employer in a position of direct conflict, motivated by loyalty to the employer to further the interests of the employer rather than the interests of the employees. However trite such a story might seem if it were assessed as literature, it plainly serves the purpose of a complaint – providing a plausible allegation of disloyal and imprudent conduct by petitioners.

Indeed, petitioners themselves do not contest that point directly. The only arguments directly relevant to that point are the assertions by petitioners' amici that none of the truthful public information available to petitioners could have caused the price of Fifth Third stock to be overvalued: the publication of the information ensured, they say, that the information was incorporated into a perfect market price. *E.g.*, Amicus Br. of Keycorp 9.

But nothing in ERISA obligates this Court to accept a conception of a market functioning even more perfectly than its everyday participants believe. Our financial institutions include an entire industry that analyzes investments for the purpose of determining if they are overpriced or underpriced, with a goal of advising clients whether they should buy, hold, or sell, particular investments. *See also Amgen Inc. v. Connecticut Ret. Plans*, 133 S. Ct. 1184, 1204 (2013)

(Alito, J., concurring) (noting that substantial evidence undermines the credibility of the efficient markets hypothesis).

In any event, abstract notions of market efficiency have no relevance to the Complaint. It is central to the allegations of the Complaint, and entirely plausible, that the individual petitioners did not respond to such information with the same care, attention, and investigation as an independent (that is, non-conflicted) and prudent fiduciary would have. The appropriate question is not how the information might, or might not, have affected the price of the stock, but whether a non-conflicted and prudent fiduciary would have taken any action in response to the information available to petitioners.

II. ERISA's Duties of Loyalty and Prudence Apply To The Trustees of Plans That Own Employer Stock.

Although petitioners spend little time directly discussing ERISA's duties of loyalty and prudence, their brief suggests no fundamental disagreement with our understanding of those duties in the abstract. Rather, the core of their position is that those duties do not apply to ERISA plans that own employer stock, unless the employer happens to be in dire financial straits. They reach that conclusion by balancing the interests in employee ownership of employer stock against the duties imposed by ERISA, and concluding that the former interests prevail almost to the point of employer insolvency.

The central problem with that analysis is that Congress already has specified the way in which those interests should be balanced, and Congress' balance leaves the duties of loyalty and prudence on which

respondents rely unaffected by the Plan's investment strategy. Nothing in the general language of Section 404 or the provisions of an ERISA plan can overcome Congress' determination that fiduciaries retain duties of loyalty and prudence even if the plan owns employer stock.

A. Section 404(a)(2) of ERISA Limits the Duty to Diversify for Fiduciaries of Plans That Own Employer Stock, But Does Not Remove the Duties of Prudence and Loyalty.

Because the central issue in this case is the extent to which conventional fiduciary duties obligate fiduciaries of ERISA plans that own employer stock, the most important source is the language with which Congress addressed that very issue:

> In the case of an eligible individual account plan, * * * the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is [*sic*] not violated by acquisition or holding of qualifying employer * * * securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).

Reading that provision against the structure of subsection 404(a) as a whole, there can be no doubt that the Plan's investment in employer securities affects the duty to diversify (which is not at issue here), but not the duties of prudence and loyalty on which the Complaint relies. Because the exception in paragraph 404(a)(2) follows immediately upon the substantive rules stated in paragraph 404(a)(1), it must be read against that provision. Against the creation of three separate fiduciary duties in

paragraph 404(a)(1) (in paragraphs (1)(A), (1)(B), and (1)(C)),[15] the language can only be read to exclude the exception's application to paragraph 1(A) (the duty of loyalty) or to any aspect of paragraph (1)(B) (the duty of prudence) unrelated to diversification.

Because Congress has so directly addressed the conflict between the policy of fostering employee ownership of employer stock and the policy of securing the retirement income of employees, the long paeans of petitioners and their amici to the benefits of employee ownership of employer stock[16] are wholly irrelevant. We can take for granted that Congress at various times has thought it appropriate to encourage employees to own stock in their employer. And we can accept as a given that in some instances that policy has motivated substantial limitations on the rules that ordinarily govern ERISA plans. It might even be thought by some that it would be better social policy if plans that own employer stock were immune from ERISA altogether. But none of that can justify shifting the line of demarcation that Congress specified in paragraph 404(a)(2), which calls for the continued application of the duties of loyalty and prudence on which the Complaint relies.

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[15] Because the duty related to the provisions of the Plan (paragraph 404(a)(1)(D)) is mentioned neither in the Complaint nor in paragraph 404(a)(2), it is not directly relevant to the construction issue. Its most important function in this case is providing an example of Congress' settled determination that fiduciaries should ignore plan provisions inconsistent with ERISA.

[16] *E.g.*, Petitioners' Br. 4-9, 21-22, 35-40; Amicus Br. of Chamber of Commerce 5-13; Amicus Br. of ESOP Ass'n 20-26; Amicus Br. of Securities Industry and Financial Markets Ass'n 10-11, 24-26.

B. The General Language of Section 404(a)(1) of ERISA Does Not Vitiate the Balance Between Employer and Employee Interests That Congress Specified in Section 404(a)(2).

Counsel for petitioners are far too skilled to rest such a stark limitation of the statutory fiduciary duties on unanchored concerns about the benefits of employee stock ownership. Rather, they proffer a statutory hook for their argument in the general language of paragraph (a)(1)(B). To their mind, that language establishes a balance much more favorable to employer interests than the balance Congress explicitly struck in paragraph (a)(2). Specifically, they jump from Congress' general command that the fiduciary is to act as a "prudent man ***acting in a like capacity*** and familiar with such matters would use in the conduct of an enterprise ***of a like character and with like aims***," ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (emphasis added), to the specific idea that the trustees of ERISA plans that own employer stock operate, with rare exceptions, exempt from the conventional duties of loyalty and prudence. *See* Petitioners' Br. 25-29. Several obvious problems afflict that reading of paragraph (a)(1)(B).

1. Petitioners' reading of paragraph (a)(1)(B) ignores the context provided by paragraph (a)(2). The most serious problem is that petitioners elevate the loose and aspirational language of paragraph (a)(1)(B) over the explicit line-drawing in paragraph (a)(2). As this Court recently has had occasion to recognize, it makes no sense to use general language of a statute to create an exception that authorizes conduct more explicitly prohibited elsewhere in the statute. So, for example, in *RadLAX Gateway Hotel, LLC v.*

Amalgamated Bank, 132 S. Ct. 2065 (2012), a bankrupt debtor sought to "cram down" on unconsenting creditors a plan that would sell the collateral of the creditors without allowing the creditors to enter "credit bids" at the sale. Because subparagraph (ii) of Bankruptcy Code § 1129(b)(2)(A), 11 U.S.C. § 1129(b)(2)(A), explicitly required that such sales permit credit bidding, a unanimous Court refused to read paragraph (iii) of the same provision to allow sales without credit bidding:

> We find the debtors' reading * * * to be * * * contrary to common sense. A well established canon of statutory interpretation succinctly captures the problem: it is a commonplace of statutory construction that the specific governs the general. That is particularly true, where * * * Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.

RadLAX, *supra*, 132 S. Ct. at 2070-71 (brackets, citations, and internal quotation marks omitted).

That rule is no stranger to this Court's reading of ERISA. The Court emphatically has rejected the use of unanchored "notions" of statutory "purpose" as a basis for

> overcom[ing] the words of [the] text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.

Mertens v. Hewitt Assocs., 508 U.S. 248, 261-62 (1993) (citation and internal quotation marks omitted).

In sum, to read paragraph (a)(1)(B) as broadening the explicit exception created in paragraph (a)(2) is to "cut" the language brutally "from the moorings" of its context, *Fisher v. U.S.*, 425 U.S. 391, 401 (1976). If Congress expected courts to infer vitiation of fiduciary duties from the reference to "like aims" in paragraph (a)(1)(B), then Congress had no need to enact (a)(2) at all.

Moreover, as if the statutory language were not clear enough, the proponents of ERISA addressed the issue even more explicitly in the Senate Report discussion of the exception: "It is emphasized, however, that even with respect to the transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards." ERISA Senate Report, *supra*, at 31. The emphasis on continued application of fiduciary duties to employer plans was not lightly considered. The Senate Report provides a detailed discussion of prior drafts of ERISA that would have given fiduciaries more latitude, followed by the rejection of those drafts based on concerns that "fiduciary-commercial relationships * * * tend to subordinate the strict professionalism expected of fund managers to business pressures and that, inevitably, certain fund managers are bound to yield to these pressures and cause trust fund abuse." Senate Report, *supra*, at 32.

The Committee acknowledged that the language of ERISA as adopted might destabilize "various established and recognized practices * * * in connection with employee benefit plans," but nevertheless concluded that the "overriding need to protect workers' pension funds * * * out-weighed [the effects of the statute on

fiduciaries and employers]." Senate Report, *supra*, at 32.

2. Petitioners' argument does not apply to the duty of loyalty. Another foundational problem with petitioners' reliance on the three-fold reference to "like" in paragraph (a)(1)(B) is that it offers no response to claims (like those in the Complaint) based on the duty of loyalty. To overcome that hurdle, petitioners must read the statute in three convoluted steps: (I) Congress carved the duty of loyalty out of the employer-stock exception in paragraph (a)(2); (II) Congress included vague references to "like" in paragraph (a)(1)(B) to overturn the boundaries drawn in (a)(2); and (III) Congress left it entirely to judicial construction to remove the duty of loyalty from the application of (a)(2). Perhaps it is simpler to read the statute as written, with paragraph (a)(1) describing the three-fold fiduciary duties, and paragraph (a)(2) specifying the exceptions from those duties for plans that own employer stock.

3. Petitioners' reading of paragraph (a)(1)(B) reads a directive for fact-specific decision making as a command for hard-and-fast bright-line rules. A third problem with petitioners' reliance on the "like" phrasing in paragraph (a)(1)(B) is that their reading is far from natural. In context, the references to enterprises of a "like character" with "like aims" plainly are aspirational reminders that the application of fiduciary duties is necessarily and inherently a fact-specific endeavor, not susceptible of broad and crisp generalizations.

To read those loose words as creating the precise superstructure of exceptions from fiduciary duty that petitioners prescribe is to force into the words a reading no ordinary reader would give them. Petitioners do not suggest that any court previously has

applied that language (or parallel language in the Restatement)[17] to do anything of the sort, and there is no reason the Court should go out of its way here to reject the plain implications of the language Congress chose to balance the relevant interests.

In sum, the context and language of paragraph (a)(1)(B) preclude judicial articulation of the legal rules petitioners discern in that provision.

C. The Terms of the Plan Regarding Investment in Employer Stock Do Not Vitiate the Fiduciary Duties of Loyalty and Prudence.

Finally, it bears emphasizing that the provisions of the Plan that provide for investment in employer stock cannot vitiate the fiduciary duties of loyalty and prudence. Four overlapping points make that clear.

First, as with the discussion above, this is a topic on which Congress already has spoken, emphatically rejecting the idea that the terms of a plan can exempt fiduciaries from the duties ERISA imposes on them: "Except as provided in [sections not relevant here], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA] shall be void as against public policy." ERISA § 410(a), 29 U.S.C. § 1110(a); *see also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The same section includes three specific exceptions (in the paragraphs of subsection 410(b)), but none of them

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[17] *See* Restatement (Third) of Trusts, *supra*, § 90 (calling for administration that accounts for the "purposes" and "terms" of the trust). *Compare id.* cmt. f (suggesting that a judgment about risk "is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio").

relate to the ownership of employer stock. It would be more than odd to add an uncodified judicially discerned exception to the list Congress prescribed.

Second, the problem of fiduciaries torn between following the language of a plan and following their duties to the beneficiaries does not arise in this particular case, because the Plan in this case permits the fiduciaries to alter the investment practices of the trust. Among other things, Trust Agreement § 3.3(a) gives the Administrator "the duty of monitoring [the investments of the Plan] to determine the continued prudence of offering such funds," and provides that "the Administrator shall change the investment funds if and when it deems it prudent to do so." J.A. 735. *See also* Pet. App. 4 (discussion of Plan terms by the court of appeals).

Third, and most importantly, the claims stated in the Complaint would create a basis for relief even if the terms of the Plan did require continued investment in Fifth Third stock and bar disinvestment in the stock already purchased. For one thing, nothing in the Plan documents bars the fiduciaries from truthfully advising respondents of public information (of which the fiduciaries were or should have been aware) indicating that investments in Fifth Third stock might have become imprudent. Thus, even if the Plan categorically prohibited changes in the investment strategy, nothing other than loyalty to the employer would have prevented the fiduciaries from acquiring and providing truthful investment information to the beneficiaries – the same information a prudent and disinterested fiduciary would have provided.

Finally, commonplace principles of trust law would justify (if not obligate) trustees to deviate from the

written terms of a trust in response to changed circumstances. For example, the Restatement (Third) of Trusts § 66(1) contemplates a "deviat[ion]" from the terms of a trust "if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust."[18] It would never be the case, then, that the terms of a trust would have the categorical effect of prohibiting conduct to protect the beneficiaries from the types of harms the Complaint describes. The central question always would be what a non-conflicted and prudent fiduciary would have done in response to the situation in which the Plan was placed. The facts alleged in the Complaint fall well within any reasonable reading of the existing rules for deviation. *See supra* pp. 6-8 (discussing relevant allegations in J.A. 57-59).

Petitioners argue that the Court must read ERISA to bar *all* deviations from the language of the Plan, lest the conventional duty of prudence conflict with the provision in ERISA § 404(a)(1)(D) obligating fiduciaries to follow the terms of the Plan. Petitioners' Br. 28-29.[19] But paragraph (D) itself eliminates any obligation to comply with terms that are not "consistent with" ERISA and our discussion above of ERISA § 410(a) shows that Congress intended fiduciary duties to prevail over inconsistent terms of ERISA plans. Together, those provisions obviate any need for a strained limitation of the duty of prudence. *See*

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[18] *See also, e.g.*, Petitioners' Br. 30-34 (accepting this principle); IIA Austin W. Scott & William F. Fratcher, Scott on Trusts § 167, 287-88 (4th ed. 1987) (discussing deviation to prevent "substantial impairment" of trust).

[19] To be specific, petitioners argue that no deviations would be permitted except in "dire" circumstances; in that case, free deviations would be permitted.

supra pp. 17-18 (discussing the breadth of ERISA's exculpation provision, as compared to common-law principles).

If the text of the statute itself is not clear enough, the structure and operations of ERISA make clear how starkly a "no-deviation" rule would depart from a sensible construction of Congress' intentions. The common law always has permitted some deviation and has broadened considerably in recent decades. *See* Petitioners' Br. 32-33 & n.12 (acknowledging broadening).[20] But any debate over whether ERISA should be read as adopting the common law as it stood in the 1970's or current developing principles of trust law[21] seriously misapprehends the text, structure, and operations of ERISA. As we have pointed out repeatedly, the most prominent point on which ERISA departed from the common law was in Section 410, which suggests an intention to loosen the requirements for deviation, not tighten them.

More broadly, though, any rule that narrowly confines deviation would rest on a deep misapprehension of the difference between conventional trusts and

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[20] *See* John J. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 663-65 (1996) (explaining that the doctrine permits variation from any provision that "manifestly harms" the interests of the beneficiaries because of a presumed intention to benefit the beneficiaries); Peter J. Wiedenbeck, *Trust Variation and ERISA's Misbegotten "Presumption of Prudence,"* forthcoming TAX NOTES (Mar. 2014) [hereinafter Wiedenbeck, *Trust Variation*] (manuscript at 12) (explaining that under current principles of trust law "material purposes that would obstruct change are not lightly to be inferred").

[21] *See* Petitioners' Br. 32-33 & n.12 (arguing that ERISA should be read as incorporating 1970's principles of trust law, frozen in time).

modern defined contribution plans. The doctrine of deviation in traditional trust law reflects the simple idea that the settlor of a trust, contributing the property, should have some ability to define the uses to which the property will be put. In a modern defined-contribution plan, by contrast, the concept of "settlor" is quite different, as contributions are made in part by employers, but largely by employees. In that context, it makes little sense strictly to constrain deviations out of some desire to further the interests of the employees who themselves contributed the funds.[22] Common-law doctrines establishing safety valves for the protection of beneficiaries provide no support for a rule that prohibits fiduciaries from taking loyal and prudent actions to further the interests of the employees whose retirement funds are at stake.

In the end, any conclusion that grants absolute (or near-absolute) priority to the terms of plans would be wholly perverse. In this context, for example, it would encourage employers to establish plans that absolutely forbid any shifting of investments, as opposed to plans (like this one) that give fiduciaries an explicit obligation to monitor the ongoing prudence of investments. Given the strength of ERISA's bar on exculpation it would be illogical to allow deviations even more rarely for ERISA plans than the common law allows for conventional trusts.

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[22] *See* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 5-6) (discussing the difficulty of applying the "settlor" concept to the ERISA context).

III. The Concerns of Employers and Insiders Do Not Excuse Violations of Fiduciary Duties of Loyalty and Prudence.

Given the tenuous reading of the statute on which they rely, petitioners understandably emphasize extra-statutory concerns to justify the stark limitation on fiduciary duties that they propose. Two themes dominate their discussion: that application of normal standards of fiduciary liability places fiduciaries of funds that own employer stock in an untenably conflicted position; and that application of those same standards makes it unacceptably easy to bring class actions against companies that sponsor such plans or fiduciaries that operate them. Both concerns are spurious, largely because they elevate irrelevant employer interests over the beneficiary interests that ERISA brings to the fore.

A. The Concerns Fiduciaries Have For The Interests of Employers Do Not Excuse Disloyal and Imprudent Behavior.

The most persistent point petitioners make is that the prospect of litigation against fiduciaries of plans that own employer stock places those fiduciaries in an untenable position; they emphasize the harm that flows to the employer when fiduciaries take steps to protect the interests of the beneficiaries of the plan. Petitioners' Br. 40-44.[23] It should be obvious from the discussion above that this point all but admits a violation of the duty of loyalty the fiduciaries owe to the beneficiaries. If the fiduciaries were concerned

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[23] *See also* Amicus Br. of Chamber of Commerce 15-16; Amicus Br. of ESOP Ass'n 15-19; Amicus Br. of Keycorp 18-19; Amicus Br. of Securities Industry and Financial Markets Ass'n 13-16, 26-28.

only about the interests of the employees and not at all about their own interests or the distinct interests of the employer, then the supposed tension would dissipate entirely. Examination of the actions that petitioners failed to take underscores this point.

1. First, and most obviously, fiduciaries loyal to the interests of the beneficiaries would have collected and disseminated truthful information about the continued prudence of employee investments in stock of Fifth Third. The dissemination of truthful information would have benefited the employees because it might have led more of them, more quickly, to move their investments from the Fifth Third Stock Fund to other options under the Plan.

To the extent the relevant information was public (and the information discussed in the Complaint appears to have been public in some sense, albeit unknown to the employees), it is difficult to discern any legitimate concern the fiduciaries might have. It is reasonable to assume that a wholly non-conflicted fiduciary as a matter of course would have evaluated the prudence of all of the investments, something professional investment managers would do as a matter of course for an asset in which a client had invested more than $100,000,000.[24] And if that information suggested the prudence of shifting the client's investments toward, or away from, that asset, presumably a loyal investment manager would have disseminated that information to the beneficiaries.

Perhaps it never occurred to the fiduciaries in this case (who were not professional investment managers) to consider the problem in that light. Or perhaps they

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[24] *See* J.A. 36 (discussion of investment of Plan in stock of Fifth Third).

were concerned that dissemination of that information would have collateral consequences because of its distribution by officers of Fifth Third. But neither of those possibilities is the responsibility of the beneficiaries of the Plan, and neither of them would have constrained the activities of a wholly non-conflicted and prudent fiduciary motivated exclusively to protect the interests of its wards.

To be sure, discovery might bring to light material information that was not yet public at the time; disclosure of that information to the beneficiaries might have affected the price of the stock or affected other private interests of the individual petitioners or Fifth Third itself. But petitioners do not suggest any reason to think that disclosure of such information would have violated any applicable securities laws. So the nonpublic nature of the information seems irrelevant to any assessment of what a non-conflicted fiduciary would have done with the information.

Fifth Third and the individual petitioners might have had justifiable reasons for keeping the information private; the Complaint does not allege that the securities laws mandated disclosure of that information. But if they wished to put themselves in a position to keep material information confidential, then they should have structured their affairs to prevent such information from coming into the possession of individuals with a fiduciary obligation to disseminate it publicly. Thus, it is not the "company's decision to establish an ESOP [that has] far-reaching ripple effects on its corporate disclosures," Petitioners' Br. 44, it is the company's decision to put fiduciary control of that fund in the hands of corporate insiders.

That is the root of the matter – if the Plan were operated by independent fiduciaries, with no conflicting interests, none of these problems would have arisen. It is possible that independent fiduciaries would not have learned of the material nonpublic information. But we can never know what they might have learned, or done, because petitioners arranged the affairs of the Plan to deprive respondents of one of the principal protections that ERISA guarantees: the services of an exclusively loyal and non-conflicted fiduciary. What we do know is that the deeply conflicted fiduciaries that were in place did nothing with the information that they did have, public or nonpublic. There is nothing in the least bit problematic about holding them accountable for that.

We recognize that the status of some of the petitioners as officers and employees of Fifth Third is not, by itself, a violation of ERISA's duty of loyalty. *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). *See generally Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112-13 (2008) (discussing conflicts of interest where employer controls decision making under a plan). But that provision can no more readily provide insider fiduciaries a free pass than the provisions of ERISA § 404(a)(2) discussed above. Read in light of the obligation to act "solely in the interest" of the participants and beneficiaries and for the "exclusive purpose" of providing benefits to the participants and beneficiaries, it is plain that insider fiduciaries must comply with ERISA standards. *See also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (obligating fiduciaries to comply with plan terms only "insofar as [they] are consistent" with ERISA); ERISA § 410(a), 29 U.S.C. § 1110(a) (invalidating plan provisions inconsistent with ERISA).

Wherever the boundary might be, insider fiduciaries cross the line when they take action (or choose not to take action) not because of a considered view that they are furthering the best interests of the employees, but rather because the action serves their own interests. *See Glenn*, *supra*, 554 U.S. at 127-28 (Scalia, J., dissenting) (explaining that a fiduciary violates the duty of loyalty when a "conflict *actually* and *improperly motivates*" the fiduciary's actions) (emphasis omitted). As Judge Friendly put it:

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers and directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

Donovan v. Bierwith, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.) (citations omitted).

Again, we do not suggest that conflicted insider fiduciaries like petitioners are liable solely because of the dual loyalties to which they have subjected themselves. It is, however, surely relevant to the assessment of *their* actions. *See Glenn*, *supra*, 554 U.S. at 115-19; *Donovan*, *supra*, 680 F.2d at 275-76

(suggesting that conflicted fiduciaries should conduct an independent investigation before following a course of action that provides substantial benefits to the employer); *Leigh v. Engle*, 727 F.2d 113, 125-26 (7th Cir. 1984) (following *Donovan*).[25] Most importantly for present purposes, it crystallizes the proper analysis of the conflicted situation that petitioners emphasize: if the conflict interferes with the performance of their duties then it provides no substantial excuse, but rather demonstrates a plain breach of loyalty.

2. Given the information available to petitioners, it also is reasonable to expect (as the Complaint alleges) that a non-conflicted and prudent fiduciary would have gone beyond the mere collection and dissemination of information, to alter the routine practice of increasing investments in the stock of Fifth Third, or even to sell some of the stock of Fifth Third already owned by the Plan. Surely at a minimum a non-conflicted and prudent fiduciary would have investigated the prudence of altering the investment strategy of the Plan. *See* J.A. 735 (Trust Agreement § 3.3(a)).

Petitioners probably are correct to assert that such actions by the existing fiduciaries would have had adverse consequences for Fifth Third and for

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[25] The parallel to the *Revlon* duties of directors under Delaware law is instructive. Following the decision in that case, directors that are corporate insiders considering a merger, sale, or similar transaction (where their interests are inherently conflicted) avoid liability for breach of the duty of loyalty only by appointment of a committee of independent directors to consider the decision in question. *See Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *Compare* Petitioners' Br. 47 (comparing fiduciary duty of the individual petitioners to business judgment rule under Delaware law).

petitioners. Indeed, we agree that in some circumstances those actions might have violated the securities laws if they had not been preceded by the disclosure of any nonpublic information that motivated the shift in investment strategy. *See* Petitioners' Br. 42-44.

But that does not at all suggest (as petitioners and their amici argue) that fiduciaries cannot be held responsible for failing to take action. To the contrary, it simply underscores the point made above. Petitioners' decision to put fiduciary control of the Plan in the hands of individuals closely tied to Fifth Third and privy to confidential information about its affairs cannot reasonably absolve petitioners of their duties of loyalty and prudence to the beneficiaries of the Plan. If anything, the inherent conflict of the position into which Fifth Third placed the fiduciaries should subject them to *greater* scrutiny, not less. As between the employees and the corporate insiders who arranged the situation, why should the employees bear the loss occasioned by any difficulties the situation presented?[26]

No pressing legal constraint drove Fifth Third to place the Plan in the control of corporate insiders.[27]

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[26] In assessing the relative ability to bear those losses, it bears mentioning that low-wage workers are much more likely to have their plan assets concentrated in company stock than higher-wage workers. *See* GORDON P. GOODFELLOW & SYLVESTER J. SCHIEBER, *Investment of Assets in Self-Directed Retirement Plans*, in POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY 67, 86 (Michael S. Gordon et al. eds., 1997).

[27] Indeed, it is now commonplace for large corporations to place employee pension plans in the control of independent fiduciaries. *See, e.g.*, *Honeywell Pension Move*, N.Y. Times, Dec. 31, 2002, *available at* http://www.nytimes.com/2002/12/31/business/honeywell-pension-move.html?pagewanted=print (last visited Feb. 24,

The decision not to employ professional and independent investment managers for an investment of that size might be permitted by ERISA, but it certainly is not required. In the early days of ERISA, when the majority of ERISA plans were defined benefit plans, employers had a strong business reason for controlling the plans, because employers retained the residual investment risk. With the rise of defined contribution plans like this one,[28] for which employees bear the residual investment risk, that concern has largely eroded. *See LaRue*, *supra*, 552 U.S. at 255-56 (discussing implications of shift from defined benefit to defined contribution plans); Fischel & Langbein, *supra*, 55 U. CHI. L. REV. at 1127.

It also bears noting that the plans that owned employer stock at the time ERISA was enacted for the most part were supplemental pension plans. A shift during the intervening decades so that the dominant usage of those plans is to provide the primary source

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2014) (appointment of U.S. Trust by Honeywell); W.R. Grace & Co., *Grace Announces Sale of Shares by the Grace 401k Plan* (Apr. 12, 2004, *available at* http://www.grace.com/media/NewsItem.aspx?id=513545 (last visited Feb. 24, 2014) (appointment of State Street by W.R. Grace); Dealbook, *Ford Plans to Repay $4 Billion in Debt*, June 30, 2010, *available at* http://dealbook.nytimes.com/2010/06/30/ford-plans-to-repay-4-billion-in-debt/?_php=true&_type=blogs&_r=0 (last visited Feb. 24, 2014) (discussing "independent fiduciary and investment manager" for the Ford pension plan); Mary Williams Walsh, *Pension Shift at Northwest Raises Fears*, N.Y. Times, Apr. 5, 2003, *available at* http://www.nytimes.com/2003/04/05/business/pension-shift-at-northwest-raises-fears.html?pagewanted=all&src=pm (last visited Feb. 24, 2014) (discussing appointment of Aon Consulting as an independent fiduciary for Northwest Airlines plan).

[28] The point is particularly true for 401(k) plans, like this one, that offer a variety of investments.

of retirement income makes it even less tolerable to adopt a rule putting those plans largely outside the ERISA fiduciary regime.[29] Indeed, an intervening change in the applicable tax rules (which imposes a tax penalty on early withdrawals from such funds) has all but eliminated the use that was common when ERISA was enacted.[30]

The proponents of ERISA contemplated that the fiduciary duties it imposed might lead to changes in extant business practices. *See* ERISA Senate Report, *supra*, at 32. The possibility that enforcement of those standards might lead to more independent management of employee pension plans can hardly justify reading the statute to preserve business practices that dominated the landscape against which Congress felt the need to enact ERISA in the first instance.

B. The Ease or Difficulty of Bringing Litigation Against Employers and Insiders Is a Function of Legal Standards and Pleading Rules Within the Domain of Congress.

Petitioners and their amici also decry the undue ease with which opportunistic attorneys can initiate class actions against companies that sponsor ERISA plans investing in employer stock or the fiduciaries that manage them. In general, the claim is that these are mere "stock drop" actions, predicated on nothing more than a decline in the value of the employer's

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[29] *See* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 16-18).

[30] *See* 26 U.S.C. § 72(t). *See generally* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 19) (discussing the adoption of that rule in 1986 and its effect on the uses of ERISA plans owning employer stock).

stock.[31] Indeed, amici go so far as to claim that these ERISA "stock drop" actions should be condemned as an illegitimate end run around the constraints of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).[32] Petitioners similarly contend that application of normal fiduciary duties will have courts second-guessing reasonable decisions of fiduciaries. Petitioners' Br. 39-41.

To be sure, few class actions against the fiduciaries of ERISA plans challenge a rise in the value of investments. There is nothing remarkable about that, given the difficulty of proving damages in the management of an asset that has increased in value. But whatever might be true about the specificity of those complaints as a group, the criticism is wholly unfounded with regard to the Complaint at issue here (J.A. 15-282). As summarized above, the 287-paragraph Complaint details a longstanding course of misconduct, relying on prodigious documentation, detailing numerous specific actions of petitioners that precede and accompany the period during which the price of the stock fell. For allegations drafted before discovery has commenced, they are remarkably detailed.

But of course the important point is that the PSLRA does not apply here. The existence of the PSLRA shows Congress' ready attention to whatever stress putative "stock drop" actions might place on normal

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[31] Amicus Br. of Chamber of Commerce 19-21; Amicus Br. of ESOP Ass'n 7-10; Amicus Br. of Keycorp. 10-18; Amicus Br. of Securities Industry and Financial Markets Ass'n 30-35.

[32] Amicus Br. of Keycorp 9-10.

rules of pleading. There will be time enough for the Court to parse special pleading rules for ERISA class actions if Congress decides to enact them. For the present, though, the Court is left with only the stringent fiduciary standards of ERISA and the customary pleading standards articulated in FED. R. CIV. P. 8 as interpreted in *Iqbal* and *Twombly*.

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In the end, petitioners' central point is not that the Complaint fails to state a cause of action under the customary standards of loyalty and prudence. Rather, petitioners contend that the Court should use the interest in fostering employee stock ownership to create a rule that requires dismissal of any complaint that fails to establish that the employer is in dire financial straits. Although the lower courts following *Moench* have regarded this as a "presumption," petitioners are more forthright: they articulate a substantive rule calling for dismissal of a complaint that fails adequately to allege financial distress of the employer. *See* Petitioners' Br. 46 & n.19, 50-52.[33]

To be clear, if all complaints that do not establish financial distress are to be dismissed, this means that the fiduciaries of plans that own employer stock owe no enforceable duties of prudence and loyalty *except* to employees of financially distressed companies. We have demonstrated above that no sensible construction of Congress' intent can support that rule. Could Congress have intended to excuse the fiduciaries of a plan who sell their own stock (anticipating financial distress) but at the same time take no action to advise the employees either of those sales or of the

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[33] *See* Amicus Br. of Chamber of Commerce 18 (same).

information motivating those sales?[34] Or a fiduciary who purchases stock with the funds of employees, despite actual knowledge that the securities were overvalued (among the allegations of this Complaint)?

Surely a more sensible standard is the one Congress adopted: that fiduciaries are held to their traditional duties of loyalty and prudence, whether the fund owns employer stock or other assets. That standard presents a simple question, readily amenable to customary methods of proof and judicial review: how do the actions of the fiduciaries compare to the actions that wholly non-conflicted, loyal, and prudent fiduciaries would have taken? Under that standard, the Complaint describes conduct actionable under ERISA.

CONCLUSION

This is far from the first occasion on which this Court has examined the duties Congress imposed on the fiduciaries of ERISA plans. Our view is that the text provides such a clear answer in this case that nothing further is relevant. To the extent the Court feels a need to look further, we think the Court's own words adequately suggest the incongruity of the exemption petitioners discern in the narrow gaps of ERISA's "reticulated" framework (*Mertens*, 508 U.S. at 251 (citation and internal quotation marks omitted)):

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[34] The hypothetical is all too realistic. *E.g.*, Richard A. Oppel, Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. Times, Nov. 22, 2001, at A2 (discussing the juxtaposition of sales of Enron stock by company executives with a steep decline in the retirement funds of Enron employees invested in Enron stock); *see also* Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815, 824 (2004) (reporting that Enron employees lost 70%-90% of their retirement funds and discussing similar incident at Global Crossing).

> The statute itself says that it seeks "to protect the interests of participants and beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries and providing for appropriate remedies and ready access to the Federal courts." Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries." Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.

Varity Corp., *supra*, 516 U.S. at 513 (citations and ellipses omitted).

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JOSEPH H. MELTZER
EDWARD W. CIOLKO
SHANNON O. BRADEN
KESSLER TOPAZ MELTZER
& CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY MCKENNA
& EGLESTON
440 Park Avenue South
Fifth Floor
New York, NY 10016
(212) 983-1300

RONALD J. MANN
Counsel of Record
435 West 116th Street
New York, NY 10027
(212) 854-1570
rmann@law.columbia.edu

MAURICE R. MITTS
MITTS LAW, LLC
1822 Spruce Street
Philadelphia, PA 19103
(215) 866-0112

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REPLY BRIEF

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IN THE
Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,
v.
JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething &
Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Robert A. Long, Jr.
John M. Vine
David M. Zionts
Covington & Burling LLP
1201 Pennsylvania Ave NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

Neither respondents nor the Government defend the decision below. The court of appeals held that an ESOP fiduciary's decision to remain invested in company securities is accorded a "presumption of prudence," but declined to apply the presumption at the pleading stage. Respondents and the Government argue instead that ESOP fiduciaries should *never* be accorded a presumption of prudence – a position that has been unanimously rejected by the courts of appeals. To support their argument, respondents and the Government disregard clear statements of congressional intent and insert words into the statute that are not there. The Government asks the Court to jettison the standard applied by the lower courts in favor of a vague, untested, and unworkable "overvaluation" standard. Respondents attempt to redirect the Court's attention even further afield, injecting arguments about ERISA's duty of loyalty that are not properly before the Court and in any event lack merit. The decision of the court of appeals should be reversed.

I. Neither Respondents Nor The Government Defend The Court Of Appeals' Holding That The Presumption Of Prudence Is Inapplicable At The Pleading Stage.

Every court of appeals to have decided the issue agrees that an ESOP fiduciary's decision to adhere to plan terms by continuing to invest in employer securities is presumptively prudent. *See* Pet. Br. 22 (citing cases). The Sixth Circuit has created a circuit

conflict by refusing to apply this presumption at the pleading stage. Pet. App. 11-12; Pet. Br. 49. In the court below, both respondents and the Government argued that the presumption does not apply at the pleading stage. *See* Resp. C.A. Br. 16-25; U.S. C.A. Br. 18-26.

Before this Court, however, neither respondents nor the Government even address, let alone defend, the Sixth Circuit's holding that the presumption of prudence does not apply at the pleading stage. For the reasons set out in petitioners' opening brief, the Sixth Circuit's position is wrong. *See* Pet. Br. 45-50.

Rather than addressing the issue that has divided the circuits, respondents and the Government have chosen to address a different issue. They argue that there should be no presumption of prudence at *any* stage of the case. There is no circuit split on this issue; the position advocated by respondents and the Government has been *unanimously* rejected by no fewer than seven courts of appeals. Pet. Br. 22. Moreover, the Government asked this Court to amend the question presented to include this issue, *see* U.S. Cert. Br. 19, and the Court declined to do so. The Government nevertheless devotes its entire brief to the question. To the extent the Court considers this question, it should reject the Government's position.

II. Offering Employer Stock As An Investment Option Is Presumptively Prudent, Absent Fundamentally Changed Circumstances Making The Investment Inconsistent With The ESOP's Basic Purpose.

The text, structure, and history of ERISA establish that the core purpose of an ESOP is to provide an opportunity to build employee ownership of employer stock. *See* Pet. Br. 25-42. Thus, it is ordinarily prudent for an ESOP fiduciary to do exactly what the plan instructs her to do: allow participants to continue investing in employer stock. A prudent person managing an enterprise with the "character" and "aim" of increasing employees' ownership stake usually will act to further that purpose, even if the stock price is volatile.

But not always. If, due to fundamentally changed circumstances, continued investment in employer securities would no longer further the aim of building long-term employee ownership, it would no longer be prudent to follow the plan's terms. As trust law confirms, prudence may require deviating from the plan's terms, but *only* when adherence to those terms would no longer further the plan's purpose. Pet. Br. 25-30. Aside from the court below, every appellate court to address the question has adopted a comparable standard.

Respondents and the Government, however, view that standard as "extreme." Defying clear expressions of congressional intent, they argue that ESOPs may not be administered for the purpose of building employee stock ownership. They further argue that Congress's decision not to completely

exempt ESOP fiduciaries from the duty of prudence implies that courts must impose a particularly strict standard of prudence. And they ask this Court to replace the sound standard developed by the lower courts with an untested, ill-defined, and unworkable "materially overvalued" standard. These arguments lack merit.

A. The Prudence Standard Takes Account Of An ESOP's "Character And Aims".

1. The Fundamental Purpose Of An ESOP Is To Allow Employees To Acquire An Ownership Stake In Their Employer.

a. Congress defined the duty of prudence in terms of the "character" and "aims" of the "enterprise." 29 U.S.C. § 1104(a)(1)(B). Respondents and the Government contend that Courts must ignore the distinctive "character and aims" of ESOPs because building employee stock ownership is not a legally cognizable plan objective. This novel approach is fundamentally at odds with ERISA. As ERISA's text makes clear, investing in employer securities is exactly what an ESOP is "designed" to do. 29 U.S.C. § 1107(d)(6)(A). Indeed, an ESOP is defined as a "stock bonus plan" – that is, a plan in which the benefits are distributable in *employer stock*. *Id.*; *see also* 26 C.F.R. § 1.401-1(b)(1)(iii) (defining "stock bonus plan"). The core purpose of an ESOP is confirmed by the structure of the statute, which exempts ESOPs from the diversification requirement so that ESOPs can pursue their distinctive aim. 29 U.S.C. § 1104(a)(1)(C), (a)(2). Failure to diversify

"would be perilous if ESOPs were intended to replace traditional pension arrangements, but they are not; they are intended to promote the ownership . . . of firms by their employees." *Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003).

The special purpose of ESOPs is further confirmed by the Tax Reform Act of 1976, which expressly distinguishes "conventional retirement plans" from ESOPs, which are intended to "bring[] about [employee] stock ownership." Pub. L. No. 94-455, § 803(h). The Government attempts to dismiss the Tax Reform Act as a "mere" statement of "congressional intent" concerning certain tax regulations. U.S. Br. 21. Had Congress's concerns been so limited, it could have adopted legislation disapproving those regulations. Instead, Congress enacted a sweeping declaration of policy concerning ESOPs, and stated that it "made clear its interest [in ESOPs]" in ERISA. Tax Reform Act of 1976, § 803(h). In addition, Congress expressly provided that ESOPS, because of their "special purposes," may "distribute [dividends] on employer securities currently." *Id.* A plan that provided only retirement benefits could not make such current distributions.[1]

b. The Government's sole textual basis for ignoring the special character and aims of an ESOP

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[1] The Government similarly dismisses the relevance of the ERISA Conference Report's statement that ESOPs are "designed to build equity ownership" for employees, H.R. Rep. No. 93-1280, at 313 (1974) (Conf. Rep.). U.S. Br. 22-23. The statement's context hardly undermines its value in showing that Congress viewed building employee ownership as the core purpose of ESOPs.

is the requirement that fiduciaries administer plans for the "exclusive purpose" of "providing benefits to participants." U.S. Br. 19 (quoting 29 U.S.C. § 1104(a)(1)(A)). That provision simply prohibits fiduciaries from pursuing selfish motives in administering a plan. It does not forbid them from pursuing the plan's objectives, as the settlor – and Congress – intended.

The Government reads the "exclusive purpose" provision not just to exclude improper motives, but to require fiduciaries to maximize retirement security to the exclusion of other goals – a perspective that is fundamentally inconsistent with the diversification exemption, and has never been adopted by the courts. *Cf. Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2001) (rejecting a "paternalistic" approach to ERISA that would prevent plans from offering "high-risk, and potentially high-return" options). To reach this result, the Government rewrites the statute, inserting the word "*retirement*" before "benefits." U.S. Br. 19 (referring to "ERISA's explicit command to operate plans with the exclusive goal of safeguarding *retirement* benefits" (emphasis added)).[2] This atextual approach ignores the fact that ERISA plans can and do have objectives other than, or in addition to, providing retirement benefits. For example, an ERISA-covered pension plan may provide for death and disability benefits, as well as severance distributions before the employee attains

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[2] Similarly, respondents suggest that § 1104(a)(1) requires fiduciaries to impose their vision of participants' "best interests." Resp. Br. 41. The term "best interests" does not appear in § 1104.

retirement age – distributions that could not be made if the fiduciary were limited to "safeguarding retirement benefits." *See, e.g.*, 29 U.S.C. § 1055; 26 U.S.C. § 401(k)(2)(B)(i).

To be sure, ESOPs can deliver very substantial retirement benefits. An ESOP provides employees the opportunity to invest in their employer's success, and potentially reap a large return at retirement. Moreover, employees are demonstrably better off in pension plans with ESOP components than without them, since employer contributions to ESOP plans typically are much higher. *See* ESOP Ass'n Br. 24. But an ESOP's primary objective, attributable to Congress's clear policy choice, is to build employee ownership. Nothing in ERISA's general requirement that fiduciaries act to "provid[e] benefits to participants" requires fiduciaries to disregard this core purpose.

c. In support of its view that an ESOP fiduciary may not pursue the goal of employee ownership, the Government points to Congress's efforts to "improve the reliability of ESOPs as retirement vehicles." U.S. Br. 20. As the Government recognizes, however, Congress promoted employees' retirement security by expanding their rights to diversify *out of* ESOPs. *See* Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, § 901; *see also* I.R.S. Notice 2006-107, 2006-2 C.B. 1114 (model notice to employees, warning that their "retirement savings . . . may not be properly diversified" if they make excessive investments in employer stock). Thus, the Government has it backwards: in limiting certain employers' ability to *compel* employees to build ownership through an ESOP, Congress has

recognized that an undiversified ESOP is not, on its own, an optimal retirement vehicle.

Far from supporting respondents and the Government, the PPA reflects Congress's continuing commitment to employee ownership.[3] Faced with post-Enron criticisms of ESOPs, Congress responded by enhancing employee choice – not by restricting ESOPs or imposing untenable duties on fiduciaries. Notably, respondents and their *amici* repeat many of the same policy arguments for limiting employee choice that Congress rejected. *See, e.g.*, Law Professors Br. 14. Consistent with Congress's policy decision to continue encouraging ESOPs while expanding employee choice, participants in plans like Fifth Third's are free to avoid or limit the risks inherent in investment in employer stock.[4]

In amending ERISA to expand employees' diversification rights, Congress was aware that courts were applying a presumption of prudence. *See Retirement Insecurity: 401(k) Crisis at Enron, Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 68 (2002) ("Enron Hearing")

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[3] During the legislative process, the Secretary of Labor recognized that "[b]y statutory design, ESOPs are intended to promote worker ownership of their employer with the goal of aligning worker and employer interests." *Protecting the Pensions of Working Americans: Lessons From the Enron Debacle, Hearing Before the S. Comm. on Health, Ed., Labor, & Pensions*, 107th Cong. 27 (2002) ("Chao Testimony").

[4] Respondents falsely charge that the Plan granted participants the right to divest from employer stock not as "an accident of generosity," but only to comply with the PPA. Resp. Br. 5 n.3. In fact, the Plan granted these rights before Congress required them. J.A. 576.

(testimony of Stephen M. Saxon). Congress's decision to amend certain of ERISA's ESOP provisions without changing the prudence standard indicates agreement with the presumption. *See, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (Congress "plainly ratified" the unanimous rulings of the courts of appeals when it amended Title VII without abrogating those rulings).

In sum, it is quite wrong to say that petitioners, by allowing participants to continue investing in employer stock, have "subordinated" employees' interests to some illegitimate objective. U.S. Br. 8, 20, 21; *see also* Resp. Br. 1, 23, 37. Congress has determined that the opportunity to build ownership of employer stock *is* an employee interest. Recognizing that employees also have a vital interest in retirement security, Congress expanded the rights of participants in many plans to further that interest. It would frustrate these decisions, and do violence to the statutory prudence standard, to ignore ESOPs' unique "character and aims" and treat them as nothing more than conventional retirement plans.

2. A Robust Presumption Gives Full Effect To The Duty Of Prudence.

Respondents and the Government argue that certain provisions of ERISA reflect an intent to subject all fiduciaries to "[t]he same" standard of prudence. U.S. Br. 15. To reach this result, they mistakenly conflate the *existence* of a duty with the *content* of that duty in particular circumstances.

Congress exempted ESOP fiduciaries from the duty of prudence "only to the extent that it requires

diversification," 29 U.S.C. § 1104(a)(2), and further prohibited plans from waiving the duty, *id.* §§ 1104(a)(1)(D), 1110(a). It follows from these provisions that ESOP fiduciaries owe plan participants a duty of prudence. What does *not* follow is the notion that a single, inflexible *standard* applies to all plans. That conclusion rests on faulty logic. It also ignores ERISA's clear textual command that the standard of prudence is *not* always the same, but instead depends on the "character" and "aims" of the plan. That is not "loose and aspirational" language that can be ignored (Resp. Br. 28); it is the context-sensitive standard that Congress adopted. *Cf.* Department of Labor, Employee Benefits Security Admin. Field Assistance Bulletin 2012-01 (Apr. 2, 2012), *available at* http://tinyurl.com/FAB2012-1 (noting that the "special characteristics and aims" of ERISA-covered apprenticeship and training plans allow fiduciaries of such plans to incur expenses that would be impermissible for plans with different aims).[5]

Accounting for the character and aims of an ESOP does not, as respondents and the Government suggest, vitiate the duty of prudence; it simply applies the duty in context, as the statute requires. As applied to ESOP fiduciaries, the duty of prudence serves several meaningful functions. As an initial matter, ESOP fiduciaries have a range of

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[5] Respondents and the Government have no response to the testimony of Secretary of Labor Shultz that ERISA's prudence standard was written with "built-in flexibility" requiring the court to take into account the "goals of the plan." Pet. Br. 26 (quoting Shultz testimony).

responsibilities unrelated to investment decisions that they must perform prudently. For example, where employer stock is not publicly traded, ESOP fiduciaries must act prudently in setting a "redemption price" for employees leaving the company. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732-33 (7th Cir. 2006). More generally, fiduciaries of all plans, including ESOPs, incur administrative expenses and must determine whether a particular "expenditure is a prudent use of plan assets." Department of Labor, Guidance on Settlor v. Plan Expenses (last visited Mar. 10, 2014), http://tinyurl.com/DOLPlanExpense.[6]

An ESOP fiduciary's decision to allow continued investment in employer stock may violate the duty of prudence if, because of fundamentally changed circumstances, adherence to the plan's terms would no longer further the ESOP's special purposes. The existence of dire financial straits is a leading *example* of such a change, because continued investment in a company on the brink of collapse would not meaningfully further the ESOP's goal of building employee ownership of an ongoing enterprise.[7] But other such changes could occur. For

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[6] *See also* Letter from Elliot I. Daniel, Assoc. Dir. for Regulations and Interpretations, Dep't of Labor, to Kirk F. Maldonado (Mar. 2, 1987), *available at* http://tinyurl.com/DOLMaldonado (prudence of expenses for "[a]nnual valuations of the sponsoring employer's stock held by the Plan").

[7] Petitioners' opening brief clearly stated that impending collapse was an "example" of when a fiduciary could be required to deviate from the plan. Pet. Br. 24. Referring to this (continued...)

instance, if unscrupulous managers took control of a company and began operating it in a fundamentally unlawful manner, building employee ownership of an effectively criminal enterprise could be inconsistent with the ESOP's original purpose. *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003) (allegation that Enron was operated as a RICO enterprise). If an ESOP was created with the understanding that employees would be free to divest company stock in a liquid market at any time, prudence might demand that the fiduciary cease offering this option if company stock became thinly traded.[8] Another fundamental change in circumstances might occur if Congress were to impose adverse tax consequences on employees participating in ESOPs.[9]

It is entirely appropriate that such claims meet a high bar, because circumstances that fundamentally undermine an ESOP's basic purpose are unusual. But this standard is not "virtually insurmountable," U.S. Br. 25, and does not mean that there is no meaningful duty of prudence. It means only that the

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standard as limited to dire financial circumstances, Resp. Br. 12 & n.6, misstates petitioners' position.

[8] In this circumstance, a fiduciary might conclude that unless she deviated from the terms of the plan, the plan would violate the requirement of the Section 404(c) safe harbor regulation that employer securities held by the plan be "publicly traded." *See* 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(iii), (iv).

[9] *See* Enron Hearing 124 (response of Karen Ferguson to questions for the record) (proposing that tax deferral of ESOP investments be limited to amount "that experts deem to be a prudent allocation").

content of that duty is appropriately tailored to the unique context of an ESOP. This result gives full effect to Congress's decision not to exempt ESOP fiduciaries from the duty of prudence. Unlike respondents' and the Government's position, it also gives full effect to the language of the statutory prudence standard and Congress's objective of encouraging employee stock ownership.[10]

B. The Government's Novel "Materially Overvalued" Standard Is Unworkable And Unfaithful To ERISA.

The Government rejects as "extreme" (U.S. Br. 27) the prudence standard applied by most courts and urges the Court to replace it with a novel standard that has never been accepted or applied by *any* court. The Government's proposed standard would subject fiduciaries to liability for continuing to offer investment in employer stock that is "materially overvalued." U.S. Br. 17. This standard treats an ESOP's investment in employer securities like any other plan's investment in any other fund, disregarding the plan's unique purpose.

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[10] In discussing trust law, respondents and the Government again confuse the existence of the duty of prudence with the content of that duty in particular circumstances. They argue that a trust law-derived standard is inconsistent with ERISA's departure from the trust law rule that settlors can waive the duty of prudence. U.S. Br. 24. Although ERISA's duty of prudence cannot be waived, courts must still determine when the statutory duty of prudence requires a fiduciary to depart from otherwise valid plan terms. Trust law's deviation doctrine provides guidance for that determination. *See* Pet. Br. 30-34.

An ESOP could not achieve its long-term goal of building employee ownership if its fiduciaries were forced to start and stop investments based on serial guesses about the stock's "true value" (U.S. Br. 26, 29). On any given day, a company may possess a mix of positive and negative information that could materially affect its stock price. Even if nonpublic information could lawfully drive a fiduciary's day-to-day investment decisions, the goal of an ESOP necessitates a longer view. The Government's proposed standard would also place ESOP fiduciaries in an untenable position, subject to being sued whether or not they deviated from the terms of the plan. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1279 (11th Cir. 2012) (absent a strong presumption of prudence, ESOP fiduciaries would be forced to "choose between the devil and the deep blue sea"). Under the Government's theory, moreover, fiduciaries would face still more lawsuits for permitting participants to *sell* company stock when the market has *undervalued* it, since stock can be "undervalued" just as readily as it can be "overvalued."

In addition to being unmoored from statutory text, the Government's standard is unworkable. A plaintiff might offer at least four reasons to conclude that employer stock was "materially overvalued": (1) the stock price fell; (2) there was negative, publicly available information about the company; (3) there was negative, *nonpublic* information about the company; and (4) the company made material misrepresentations to the market. The problems with each of these theories demonstrate why the Government's standard should be rejected.

1. Stock Drop. The Government recognizes that a drop in employer stock price, even a precipitous one, does not mean that the stock was "materially overvalued." U.S. Br. 26-27. But this concession will provide cold comfort to fiduciaries attempting to determine, *ex ante*, whether the price of the employer stock is close enough to its "true" value. Any competent plaintiffs' lawyer, with the benefit of hindsight, will be able to craft a complaint that meets the Government's proposed standard. Once the stock price has fallen, it will not take much imagination to allege reasons for the drop that fiduciaries "knew or should have known." U.S. Br. 27. As a practical matter, the Government's standard will expose fiduciaries to costly litigation whenever there is a substantial stock drop.

2. Public Information. Respondents acknowledge that "the relevant information" showing that Fifth Third stock was overvalued was "public in some sense." Resp. Br. 38. When the market sets a price based on all relevant information, fiduciaries (and courts) cannot be expected to determine if there is some alternate, "true" value of the stock. *Cf.* 29 U.S.C. §§ 1002(18), 1108(e) (defining "adequate consideration" for the sale of a qualifying employer security as "the price of the security prevailing on a national securities exchange"). Whether markets are perfectly efficient, *see* Resp. Br. 24-25, is beside the point. If informed, independent investors are buying at the market price, prudence cannot require a fiduciary to "outsmart the rest of the market." *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013). The Government offers no support for respondents' theory that fiduciaries must determine

whether a fully-informed market is "overvaluing" employer stock.

3. Material Nonpublic Information. The market could conceivably "overvalue" (or "undervalue") a company's stock because it lacks material nonpublic information. This is respondents' fallback theory of why Fifth Third stock was overvalued, premised on the mere possibility that "discovery might bring to light" such information. Resp. Br. 39. *But see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559-60 (2007).

The Government and respondents agree that divesting employer stock based on material nonpublic information is illegal. U.S. Br. 28; Resp. Br. 43. The Government also agrees that ceasing investment could cause the market to overreact, harming participants. U.S. Br. 28-29. Its response is to suggest that courts "take[] into account" this and other complications "in computing any damages," U.S. Br. 29 – hardly a tidy solution. The Government's preferred course of action is for a fiduciary simply to disclose the nonpublic information. But recognizing the oddity of ERISA driving corporate disclosure requirements, the Government declares that fiduciaries need not disclose information "sooner than when federal securities laws would require." U.S. Br. 29. Thus, the Government's apparent view is that fiduciaries *may* purchase "overvalued" employer stock (and allow sales of "undervalued" stock) during certain intervals of the SEC calendar, but may not prudently do so at other times. When a proposed legal standard requires this many caveats and contortions, that is a good sign it is unworkable.

4. Material Misrepresentations. The core of the Government's theory appears to be that fiduciaries are liable for investing in securities that are "materially overpriced as a result of market misrepresentations." U.S. Br. 22. In its view, respondents stated a claim by alleging that petitioners knew or should have known "that Fifth Third stock was not worth what the Plan was paying for it," because "the company's subprime mortgage lending practice was misleadingly or insufficiently disclosed." U.S. Br. 33. Notably, that is not respondents' view of their own case. Respondents believe that the information establishing that Fifth Third was a poor investment was "public," at least "in some sense." Resp. Br. 38. In any event, the Government's proposal of a quasi-securities fraud cause of action under the guise of ERISA is misguided.

As this Court has held, the "threshold" for fiduciary liability is that the defendant "was acting as a fiduciary." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Consequently, there is no ERISA cause of action for misrepresentations made to the market generally, and not directed at plan participants. *See Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996); *infra* pp. 21-22. The Government's proposed approach would circumvent that rule, creating an indirect avenue to a result the Court has previously rejected.

That result would also enable an end-run around Congress's carefully calibrated rules for securities litigation. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 (enacting heightened pleading standards, automatic stay of discovery, and other protections). This case demonstrates the

significant anomalies created by the Government's approach. The Government believes respondents have stated a claim that Fifth Third stock was overpriced because of misrepresentations to the market, but respondents do not even attempt to state a claim for securities fraud. Even more to the point, a court has *dismissed* securities fraud claims based on the same factual allegations. *Local 295/Local 851 IBT Emp'r Grp. Pension Trust & Welfare Fund v. Fifth Third Bancorp.*, 731 F. Supp. 2d 689, 726-28 (S.D. Ohio 2010).[11] Nowhere does the Government explain how – or why – courts should determine that a security is "materially overvalued" because of an alleged misrepresentation *that does not give rise to a securities fraud claim*.

To be clear, petitioners do not take the position that employees who choose to invest in an ESOP in reliance on material misrepresentations are unprotected. Like any other investor who is misled, they would generally have access to a securities law remedy. *See, e.g.*, *Kurzweil v. Philip Morris Cos.*, 2001 WL 25700, at *3-4 (S.D.N.Y. Jan. 10, 2001) (Mukasey, J.) (permitting ESOP participants to recover from a securities settlement fund); *see also* Department of Labor, Class Exemption for the Release of Claims and Extensions of Credit in

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[11] In dismissing these claims, the court pointed out that "much of the information that Plaintiffs claim was concealed," including the composition of Fifth Third's loan portfolio, "was actually reported." *Id.* at 727. This dismissal is far more relevant than Fifth Third's settlement, without any admission of wrongdoing, of SEC claims that it should have recorded certain losses in the third, rather than fourth, quarter of 2008. U.S. Br. 6 n.2.

Connection With Litigation, 68 Fed. Reg. 75,632, 75,637 (Dec. 31, 2003) ("The plan, and by extension, the participants and beneficiaries of the plan, are entitled to the same recovery as other shareholders in the securities fraud settlement."). Particularly in light of these protections, there is no need to construe ERISA as an alternative avenue for securities litigation.

* * *

In short, holding ESOP fiduciaries liable for investing in employer securities that are "materially overvalued" – in the hindsight of a court – is not viable. It would be a recipe for litigation and a strong deterrent to forming ESOPs. *Cf. Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Not only would this result thwart Congress's objective of promoting ESOPs, but the disappearance of ESOPs could lead to a reduction in employers' willingness "to make generous contributions to workers' 401(k) plans." Chao Testimony 30; *see* ESOP Ass'n Br. 24. Adopting a vague "material overvaluation" standard would not supply employees with needed protection; it would just lead employers to circumscribe employee choice in investment options and curtail pension benefits.

One final anomaly in the Government's position merits attention. Both the Government and respondents insist that all the practical concerns petitioners have raised could be avoided if companies would simply delegate fiduciary responsibilities to "a non-insider, such as an outside financial institution." U.S. Br. 30; *see* Resp. Br. 43-44. It is far from clear that this is so. As the Government (but not respondents) recognizes, simply appointing an

independent fiduciary is not enough, because the appointing fiduciary (an employee of the company) has "a fiduciary duty to keep the [independent fiduciary] informed of any pertinent information." U.S. Br. 31. The Government's solution is to designate as the *appointing* fiduciary someone who is "not likely to know material inside information." U.S. Br. 31. But even if a sufficiently low-level employee could be identified, putting a multi-million dollar ESOP in the hands of such an employee might itself violate ERISA. *See* 29 C.F.R. § 2509.75-8(D-4). Moreover, even if an employer could overcome all these problems and successfully insulate an independent fiduciary from inside information, employees would be no better off. A truly insulated fiduciary could not know that the company possessed material nonpublic information or that its public statements were false or incomplete, and so would have no reason to conclude that employer stock was "materially overvalued" (or "undervalued"). That fiduciary would therefore do exactly what petitioners did here (at additional cost to the plan): adhere to the ESOP's terms.

III. Respondents' Arguments Based On The Duty Of Loyalty Lack Merit.

Respondents (but not the Government) seek to divert the Court's attention from the duty of prudence by injecting arguments about the duty of loyalty into this case. Notwithstanding a lengthy footnote that protests too much (Resp. Br. 15-16 n.8), respondents have not made these arguments until now. *See* Resp. C.A. Br. This Court need not and should not expand the question presented to consider arguments that were not presented to the courts

below and have not been accepted by a single court of appeals.

In any event, respondents' claims of disloyalty are fundamentally flawed. Their basic contention is that petitioners have "elevate[d] irrelevant employer interests over the beneficiary interests that ERISA brings to the fore." Resp. Br. 37. As explained above, this position flatly disregards Congress's longstanding policy, expressed in ERISA and elsewhere, that an opportunity to build ownership of employer stock *is* in employees' interest. *Supra* pp. 5-7. Respondents and their *amici* are free to disagree with that policy. But they cannot fairly argue that petitioners were "disloyal" to respondents by continuing to offer them a congressionally-approved benefit.

In addition to this overarching theory of disloyalty for adhering to the purpose of the ESOP, respondents offer three other theories: that petitioners were disloyal for (1) making misrepresentations; (2) failing to provide investment advice; and (3) having a potential conflict of interest. These arguments are not properly presented, and lack merit in any event.

1. Misrepresentations. Quoting *Varity*, respondents argue that "lying is inconsistent with the duty of loyalty," and claim to have "identifie[d] more than a dozen false, misleading, and incomplete statements that petitioners made to respondent[s]." Resp. Br. 22. Petitioners do not dispute that ERISA prohibits fiduciaries from lying *to plan participants* when acting *in a fiduciary capacity*. But respondents point only to alleged misrepresentations made not "to respondents" but to the market generally. *See* J.A.

57-79. Any such misrepresentations were not made in a fiduciary capacity, and thus do not give rise to an ERISA violation. *See Pegram*, 530 U.S. at 226; *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256-57 (5th Cir. 2008) (alleged misrepresentations in SEC filings were not made in fiduciary capacity).

The court of appeals agreed with respondents' distinct argument that petitioners are liable for misrepresentations in SEC filings because they were incorporated by reference in the Summary Plan Description. Pet. App. 22-23. Petitioners disagree with that holding, but this Court did not grant certiorari on the question. Respondents' *Varity* claim for misrepresentations made in a fiduciary capacity to plan participants therefore will remain in the case regardless of what the Court decides on the question on which it granted review.

2. Investment Advice. ERISA establishes a comprehensive disclosure regime requiring plan administrators to furnish participants with specified information about the plan. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (citing 29 U.S.C. §§ 1021-31). Congress recently considered the specific question of disclosures by plans holding publicly traded employer stock, and required notice of diversification rights and the importance of diversifying. PPA § 507(a), § 901; IRS Notice 2006-107 (model notice, "The Importance of Diversifying Your Retirement Savings"). Moreover, Congress relaxed certain ERISA prohibitions to allow greater *access* to investment advice. In implementing this provision, the Department of Labor emphasized that it imposes no *obligation* on plan fiduciaries to provide such advice. PPA § 601; 29 C.F.R.

§ 2550.408g-1(a)(2); *see also* 29 C.F.R. § 2509.96-1 n.1 (qualification for 404(c) safe harbor does not require "investment advice" for participants).

Respondents do not allege that petitioners have violated any aspect of ERISA's disclosure requirements, including the PPA's required diversification notice. Instead, they contend that by failing to "disseminate[] [negative] information to the beneficiaries" – information that they concede was "public" – respondents failed to act as a "loyal investment manager." Resp. Br. 38. In light of ERISA's detailed disclosure provisions, and the principle that fiduciaries are not required to provide investment advice, courts have refused to "create a rule that converts fiduciaries into investment advisors." *Lanfear*, 679 F.3d at 1285; *see also White*, 714 F.3d at 994 ("ERISA does not require fiduciaries of an [ESOP] to act as personal investment advisers to plan participants, nor could they do so."); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349-350 (3d Cir. 2007). Respondents' proposal to read a sweeping expansion of ERISA's disclosure obligations into the duty of loyalty lacks merit.

3. Potential Conflict. Respondents argue that petitioners decided to adhere to the terms of the Plan *because of* self-interested motives. Resp. Br. 22-23. But that is not what the complaint alleges. Respondents alleged only a *potential* conflict of interest based on the fact that plan fiduciaries received some stock-based compensation. J.A. 89-92. "Under [respondents'] reasoning, almost no corporate manager could ever serve as a fiduciary of his company's Plan. There simply is no evidence that

Congress intended such a severe interpretation of the duty of loyalty." *Citigroup*, 662 F.3d at 145-46; *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 421 & n.6 (4th Cir. 2007). To the contrary, it is clear that this was not Congress's intent. *See* 29 U.S.C. § 1108(c)(3) (providing that corporate officers may serve as fiduciaries); *cf. Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115-16 (2008) (conflicted fiduciaries still entitled to deference).

If respondents' position became the law, it would force massive changes to ERISA plans. This Court has rightly avoided such results. *Glenn*, 554 U.S. at 116 (refusing to adopt an approach to conflicted fiduciaries that would "bring about near universal review by judges *de novo*"). Although respondents assert that it is "now commonplace" for "large corporations" to enlist independent fiduciaries, all they cite is press articles about four plans. Resp. Br. 43 n.27. The experience of one of those plans – the W.R. Grace Plan – demonstrates that outsourcing fiduciary responsibilities is not the panacea respondents claim. *See* Pet. Br. 40 (noting that the W.R. Grace fiduciaries have been sued *both* for selling and for failing to sell employer stock).

Lacking any basis to allege that petitioners acted for purposes of self-enrichment, respondents suggest that petitioners' conduct was so unreasonable that it can be explained only by "the effects of conflicting interests on human action." Resp. Br. 24. But that argument works only if petitioners' behavior was unreasonable. Taking into account the character and aims of the plan they were administering – as ERISA requires – petitioners' decision to continue offering employer stock as an investment option was

entirely reasonable. Thus, respondents' effort to avoid the presumption of prudence through the duty of loyalty is circular and cannot succeed. Absent a violation of the duty of prudence, any basis for an inference of disloyalty disappears.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

James E. Burke
Counsel of Record
Danielle M. D'Addesa
David T. Bules
Joseph M. Callow, Jr.
Keating Muething &
Klekamp PLL
One East Fourth St.
Suite 1400
Cincinnati, OH 45202
(513) 579-6400

Robert A. Long, Jr.
John M. Vine
David M. Zionts
Covington & Burling LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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FIFTH THIRD BANCORP, ET AL., PETITIONERS

v.

JOHN DUDENHOEFFER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

M. PATRICIA SMITH
Solicitor of Labor
G. WILLIAM SCOTT
Acting Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
THOMAS TSO
Attorney
Department of Labor
Washington, D.C. 20210

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Law Library

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, imposes duties on plan fiduciaries, including a duty to administer the plan prudently. 29 U.S.C. 1104(a)(1). The question presented is:

Whether, to state a claim that a fiduciary of an employee stock ownership plan violated the duty of prudence by continuing to invest plan assets in the employer's stock, a plaintiff must rebut a presumption that the fiduciary acted prudently by alleging that the employer faced imminent financial peril.

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The Law of Trusts and Trustees (3d ed. 2000) 11, 13
Final Regulations Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans) 57 Fed. Reg. (Oct. 13, 1992):
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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the scope of a fiduciary duty imposed on pension plan fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, which the Secretary of Labor has primary authority for administering. 29 U.S.C. 1002(13), 1135, 1136(b). At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. ERISA is designed to "protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to

the Federal courts." 29 U.S.C. 1001(b). The statute requires every plan to be established and maintained pursuant to a written instrument and to have named fiduciaries who have authority to control and manage the administration of the plan and its assets. 29 U.S.C. 1102(a)(1), 1103(a).

Fiduciaries of ERISA plans are subject to duties of loyalty and care. See 29 U.S.C. 1104(a). The statute provides that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" of the plan, and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). In addition, for most ERISA plans, the fiduciary must "diversify[ ] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). Plan participants and their beneficiaries may seek judicial redress against a fiduciary for violations of the plan or the statute, including breaches of ERISA's fiduciary duties. 29 U.S.C. 1132(a)(2) and (3).

ERISA sets forth limited exceptions to its statutory duties for fiduciaries who administer "eligible individual account plans." See 29 U.S.C. 1104(a)(2). An individual account plan (more commonly known as a "defined-contribution plan") is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C. 1002(34); see

LaRue v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). Such plans often give each participant the discretion to select from a range of investment options chosen by the plan fiduciaries. ERISA defines an "eligible" individual account plan to include any individual account plan that is a "profit-sharing, stock bonus, thrift, or savings plan," or "an employee stock ownership plan [ESOP]." 29 U.S.C. 1107(d)(3)(A)(i) and (ii). An ESOP is in turn defined as an individual account plan that "is designed to invest primarily in qualifying employer securities" and meets certain other requirements. 29 U.S.C. 1107(d)(6)(A). An employer's common stock is one type of "qualifying employer security." 29 U.S.C. 1107(d)(5)(A).

For a plan fiduciary who administers an eligible individual account plan, "the diversification requirement * * * and the prudence requirement (only to the extent that it requires diversification)" are "not violated by acquisition or holding of * * * qualifying employer securities." 29 U.S.C. 1104(a)(2). In addition, eligible individual account plans are not subject to the ordinary requirement that no more than 10% of plan assets be invested in employer stock. 29 U.S.C. 1107(a)(2) and (b)(1). ERISA also exempts such plans from rules that would otherwise prohibit a fiduciary from purchasing stock for a plan from the employer. 29 U.S.C. 1106(a), 1107, 1108(e).

2. Petitioner Fifth Third Bancorp (Fifth Third) is a large financial-services company that sponsors an individual-account retirement plan for its employees called the Fifth Third Bancorp Master Profit Sharing Plan (Plan). Under the Plan, employees make voluntary contributions from their earnings, which they can

direct into any of various investment options. See Pet. App. 30; J.A. 576-577. One of those options is the Fifth Third Stock Fund (Fund), an ESOP required to be "invested primarily in shares of common stock of Fifth Third Bancorp." J.A. 350.[1] Fifth Third makes matching contributions of up to 4% of each employee's pre-tax compensation. J.A. 349, 574-577. Participants may then transfer those contributions to another investment option. J.A. 576.

The Plan generally grants Fifth Third's Pension and Profit Sharing Committee, whose members are made up of company officials and employees, "the discretionary authority and fiduciary duty to determine the investment funds to be made available" to participants, but provides that "in all events, the Fifth Third Stock Fund * * * shall be an investment option." J.A. 289, 735. The Plan requires the Committee to "monitor[] [the] investment funds to determine the continued prudence of offering such funds" and to "change the investment funds available if and when it deems it prudent to do so." J.A. 735.

Respondents, two former participants in the Plan, filed putative class actions against Fifth Third, its Chief Executive Officer, the Committee, and other individual Fifth Third officers who allegedly acted as fiduciaries of the Plan. J.A. 24-30. Respondents sued on behalf of all participants whose plan accounts were invested in Fifth Third stock between July 19, 2007 and September 21, 2009. J.A. 15, 19-20. According to the complaint, petitioners knew or should have known

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[1] Under Department of Labor regulations, "[a]n ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP." 29 C.F.R. 2550.407d-6(a)(4).

that the company's stock was excessively risky because of the company's exposure to high-risk subprime mortgages and that its price was artificially inflated because the company's financial statements were inaccurate. J.A. 98. Noting that the price of Fifth Third stock had declined by 74% following public disclosure of the company's actual financial condition, respondents attributed a loss of tens of millions of dollars in the value of the Plan to petitioners' alleged failure "to protect the Plan and its participants and beneficiaries from the risks of the Company's reckless and improper conduct." J.A. 37.

Respondents alleged that petitioners breached ERISA's duty of prudence by continuing to offer the Fund as an investment option and to invest plan assets in the Fund, and by failing to divest plan assets from the Fund. J.A. 104. They also alleged that petitioners "breached their duties of loyalty and prudence by failing to provide complete and accurate information to Plan participants and beneficiaries" about the company's financial condition. *Ibid.* Because of that, the complaint continued, "participants in the Plan could not appreciate the true risks presented by investments in the Company's stock and therefore could not make informed decisions regarding their investments in the Plan." J.A. 105.

3. The district court granted petitioners' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Pet. App. 28-52. The court believed that it was required to presume at the motion-to-dismiss stage that petitioners' decision to continue investing in Fifth Third stock was prudent and that respondents could rebut that presumption only by plausibly alleging that Fifth Third had been in

a "dire financial predicament" during the relevant period. *Id.* at 39-45. The court concluded that respondents' allegations did not meet that standard because "Fifth Third remained a viable company throughout the [relevant] period." *Id.* at 45.

4. The court of appeals reversed. Pet. App. 1-25. It explained that, under circuit precedent, "[a] fiduciary's decision to remain invested in employer securities is presumed to be reasonable." *Id.* at 10-11 (citation omitted). But it held that the "presumption is not a[] * * * pleading requirement" and therefore does not apply at the motion-to-dismiss stage. *Id.* at 11-12. The court went on to explain that to rebut the presumption where it applies, a plaintiff must "prove that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Id.* at 12 (citation and internal quotation marks omitted). That "unembellished standard," the court held, "closely tracks the statutory language of [29 U.S.C. 1104(a)(1)(B)]," which "imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." Pet. App. 12-13.

The court of appeals concluded that respondents' allegations that petitioners knew that Fifth Third stock was an imprudent investment but continued to invest plan assets in the Fund were sufficient to state a claim. Pet. App. 15.[2]

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[2] In December 2013, the Securities and Exchange Commission instituted administrative proceedings against Fifth Third relating to the company's "failure to record substantial losses during the [2008] financial crisis by not properly accounting for a portion of its commercial real estate loan portfolio." *In re Fifth Third Bancorp.* 2 (Dec. 4, 2013), http://www.sec.gov/litigation/admin/2013/33-

SUMMARY OF ARGUMENT

A. ERISA does not require a court to conclusively presume that, absent "rare and extraordinary circumstances" (Pet. Br. 34), an ESOP fiduciary acted prudently in continuing to invest plan assets in employer stock. Rather, the same basic standard of prudence that protects all ERISA plans governs ESOP fiduciaries.

1. ERISA incorporates the "prudent person" standard from trust law. 29 U.S.C. 1104(a)(1)(B). Under that standard, a fiduciary in charge of a plan's investment decisions must conduct an adequate investigation of investment options and make reasonable choices based on that investigation. ERISA departs from trust law, however, in that an employer may not dispense with the duty of prudence by requiring the plan to make imprudent investments. 29 U.S.C. 1104(a)(1)(D), 1110(a). The prudent-person standard for investment decisions applies to all ERISA plans, including defined-contribution plans in which the fiduciary selects a menu of investment options (such as an ESOP) for participants.

2. No textual basis exists to depart from ERISA's prudent-person standard for an ESOP by presuming that its fiduciary's investment decisions are prudent absent "rare and extraordinary circumstances," such as the "impending collapse" of the employer. Pet. Br. 24, 34. Although ERISA exempts ESOP fiduciaries from the duty to diversify plan investments, the statute expressly preserves the basic duty of prudence in all other respects. Petitioners have pointed to nothing in the text of ERISA, its trust-law underpinnings, or

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9490.pdf. As part of a settlement of that matter, Fifth Third agreed to pay a civil penalty of $6.5 million. See *id.* at 1-2, 10.

its foundational purpose of providing security for retirement benefits that supports a virtually insurmountable presumption that an ESOP fiduciary acted prudently in continuing to invest plan assets in employer stock, even if the fiduciary knew or should have known that the stock was materially overvalued due to the misconduct of corporate officers. Although the duty of prudence looks to how a reasonable fiduciary would manage a plan with "like aims," ERISA provides that an ESOP, like any other plan, must be administered with the "exclusive purpose" of "providing benefits to participants and their beneficiaries" (and defraying administrative expenses). 29 U.S.C. 1104(a)(1)(A)(i) and (ii). That statutory mandate does not permit a fiduciary to subordinate the interest in protecting the value of employees' retirement savings to other interests, such as raising capital for the company and building employee ownership in it.

3. Petitioners' policy arguments do not support a judicially created presumption of prudence that lacks support in ERISA's text. A presumption is not necessary to protect fiduciaries from liability for mere drops in stock price. If that is all that is alleged, a claim should ordinarily be dismissed. Any further concern about unduly burdensome class-action litigation should be addressed by Congress. Nor is a presumption of prudence required to avoid a conflict with the securities laws. Although an ESOP fiduciary who is also a corporate officer with material inside information may have a more limited range of options to ensure compliance with her ERISA duties, she always has the option of ceasing purchases or disclosing information to the market that would prevent the stock price from being artificially inflated. Any conflict,

moreover, can be avoided by appointing an independent entity, such as a financial institution, as the investment fiduciary of the ESOP.

4. The court of appeals erred in imposing a presumption of prudence at the factfinding stage. Particularly given that plaintiffs already bear the burden of proof and that plan fiduciaries have better access to information about the investigation they undertook and what they knew about the value of the employer's stock, it would be anomalous and inequitable to impose a heightened burden of proof in this context.

B. Respondents' complaint stated a claim for breach of the duty of prudence. Respondents plausibly alleged that petitioners knew, or would have known had they undertaken an adequate investigation, that Fifth Third stock was materially overvalued because of the bank's public misrepresentations about its mortgage portfolio and financial health, but continued to invest employees' retirement savings in the Fund and to offer it as an investment option.

ARGUMENT

A. The Text And Purposes Of ERISA Do Not Support A Nearly Insurmountable Presumption That An ESOP Fiduciary Acted Prudently In Continuing To Invest Plan Assets In Employer Stock

Petitioners contend that to succeed on a claim that an ESOP fiduciary acted imprudently in continuing to make an ESOP available as an investment option and to invest plan assets in employer stock, a plaintiff must overcome a "presumption of prudence" by plausibly pleading that "rare and extraordinary circumstances" existed during the challenged period of investment, "such as a serious threat to the employer's viability." Pet. Br. 16, 34. That standard has no basis

in ERISA's text, purposes, or trust-law underpinnings and should be rejected.[3]

1. Fiduciaries of all ERISA plans are subject to the "prudent person" standard of care in making investment decisions

a. ERISA imposes a duty of prudence on all plan fiduciaries. The statute provides that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of * * * providing benefits to participants and their beneficiaries * * * ; [and] (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Those standards govern "fiduciaries' investment decisions and disposition of assets." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 143 n.10 (1985).

Congress modeled ERISA's duty of prudence on the "prudent man" standard developed in the common law of trusts, see *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996), which in similar terms provides that "[i]n his management of the trust, the trustee is required to

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[3] In its invitation brief, the United States explained that petitioners' question presented "is closely bound up with the question whether a presumption of prudence applies at all, and that question is logically antecedent to any questions concerning when such a presumption applies and what is necessary to rebut it." U.S. Br. 19. Although the Court declined the government's suggestion to reformulate the question "[t]o ensure adequate briefing" on that preliminary issue, *ibid.*, petitioners have thoroughly addressed it. See Pet. Br. 21-44 & n.7.

manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." George Gleason Bogert et al., *The Law of Trusts and Trustees* § 541, at 167 (rev. 2d ed. 1993) (*Bogert* (2d ed.)); see Restatement (Second) of Trusts § 174, at 379 (1959); 2 Austin Wakeman Scott, *The Law of Trusts* § 174, at 1408 (3d ed. 1967) (*Scott*). At common law, the prudent-person standard imposed particular requirements on a trustee's investment decisions. See Restatement § 227(a), at 529; 3 *Scott* § 227, at 1805-1806. The principal obligation of the trustee was to "make[] an investigation as to the safety of [an] investment and the probable income to be derived therefrom," and then to make a reasonable investment decision based on that investigation. Restatement § 227 cmt. b, at 530. In addition, "a reasonably prudent trustee always would have considered diversifying his investments." George Gleason Bogert et al., *The Law of Trusts & Trustees* § 612, at 22 (3d ed. 2000) (*Bogert* (3d ed.)). The trustee also had an ongoing duty to monitor investments in the trust portfolio, and "if a particular asset in the trust portfolio [became] improper as a trust investment," the trustee was required to "act promptly to sell or convert the asset to avoid or minimize the risk of loss and personal liability." *Id.* § 612, at 19.

By incorporating the common-law standard into ERISA, Congress intended those basic requirements to apply to ERISA fiduciaries. But as this Court has observed, Congress also "expect[ed] that the courts w[ould] interpret th[e] prudent man rule * * * bearing in mind the special nature and purpose of employee benefit plans." *Varity Corp.*, 516 U.S. at 497

(first set of brackets in original). Accordingly, courts applying the duty of prudence in specific cases must take into account that ERISA plans are retirement-savings programs that are vital to "the continued well-being and security of millions of employees and their dependents." 29 U.S.C. 1001(a).

ERISA's duty of prudence operates differently from the trust-law duty of prudence in at least one significant respect. Under the common law, it was "generally recognized that the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument." *Bogert* (2d ed.) § 541, at 172; see *id.* § 542, at 187; 3 *Scott* § 227.14, at 1845-1848. But as this Court has explained, "trust documents cannot excuse trustees from their duties under ERISA." *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985); cf. *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 82 (1995). ERISA provides that a fiduciary is required to follow plan terms only "insofar as [plan] documents and instruments are consistent" with the other provisions of the statute, including its fiduciary duties. 29 U.S.C. 1104(a)(1)(D). Furthermore, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any * * * [fiduciary] duty" is "void as against public policy." 29 U.S.C. 1110(a).

ERISA fiduciaries, therefore, must follow plan terms, including investment guidelines, only if they are not "inconsistent with the fiduciary principles of [Section 1104]." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973) (Senate Report). Indeed, Congress included express fiduciary duties in the statute itself in part because "the trust law in many states [had been] in-

terpreted" to relieve a fiduciary from liability for investment decisions "if the settlor specifie[d] that the trustee shall be allowed to make investments which might otherwise be considered imprudent." *Id.* at 29; see also H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973) (House Report) (same).

b. At common law, a court reviewing a trustee's investment decisions "endeavor[ed] to place itself in the position of the trustee at the time he made the investment and not to charge him with knowledge of what has happened since the investment." *Bogert* (3d ed.) § 612, at 60; see 3 *Scott* § 227, at 1807. The court would consider whether the trustee complied with his obligations "to investigate and evaluate investments, and to invest prudently." *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). In the typical case, "the extent of the trustee's investigation and evaluation [was] * * * the focus of inquiry," because "the determination of whether an investment was objectively imprudent [was] made on the basis of what the trustee knew *or should have known*; and the latter necessarily involve[d] consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate." *Ibid.*; see Restatement § 227 cmt. b; 3 *Scott* § 227.1, at 1809.

In the ERISA context, therefore, to state a claim based on losses resulting from imprudent plan investments, a plaintiff typically must plausibly allege facts showing that the fiduciaries knew that an investment was imprudent or would have known that it was imprudent if they had undertaken an adequate investigation. See *Pension Benefit Guar. Corp.* v.

Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 718 (2d Cir. 2013). Absent such allegations, a plaintiff generally will not be able to state a claim for breach of the duty of prudence based on the fiduciaries' investment decisions and offering of investment options, even if the investments turned out to be unprofitable. See *id.* at 716. Thus, when a plaintiff suing an ERISA fiduciary for breach of the duty of prudence alleges only that a publicly traded security was experiencing a decline in price at the time that the fiduciary bought it for the plan, a court should ordinarily dismiss the claim on the pleadings. See *id.* at 722; cf. 29 U.S.C. 1002(18) (providing that "'adequate consideration' * * * in the case of a security for which there is a generally recognized market" is the price at which that security is trading). We would expect that to be particularly so with respect to investment in employer securities under an ESOP, because the exemption from ERISA's diversification requirement (and the toleration of greater risk as a result) means that a fiduciary may maintain or increase plan investments in employer stock even during a volatile period if the fiduciary does not know or have reason to know that the market price materially overstates the stock's value.

c. The prudent-person standard in Section 1104 applies to defined-contribution plans as well as defined-benefit plans. Some defined-contribution plans give participants discretion in choosing investments, and Section 1104(c)(1)(A) exempts fiduciaries of such plans from liability for investment-related losses caused by participant choices. But even for such a

"Section 404(c) plan,"[4] the Secretary has established in notice-and-comment rulemaking that the "act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function." *Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans)*, 57 Fed. Reg. 46,906, 46,924 n.27 (1992). Accordingly, "the plan fiduciary has a fiduciary obligation to prudently select such vehicles, as well as a residual fiduciary obligation to periodically evaluate the performance of such vehicles to determine, based on that evaluation, whether the vehicles should continue to be available as participant investment options." *Id.* at 46,924 n.27. That interpretation of the statute is reasonable and therefore entitled to deference. See *Howell* v. *Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir.), cert. denied, 132 S. Ct. 96 (2011).

2. ESOP fiduciaries are subject to the same standard of prudence as other ERISA fiduciaries and therefore are not entitled to any special presumption that they acted prudently

ERISA's text and purposes do not support the virtually insurmountable presumption, urged by petitioners, that an ESOP fiduciary acted prudently in continuing to invest plan assets in the employer's stock or to offer it as an investment option.

a. The same prudent-person standard applicable to fiduciaries of ERISA plans generally applies to fiduciaries of ESOPs. Section 1104 sets forth specific ex-

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[4] It is not clear from the record whether the plan at issue here meets the requirements of a Section 404(c) plan. See 29 C.F.R. 2550.404c-1.

emptions for fiduciaries of eligible individual account plans, including ESOPs, but does not exempt them from the basic duty of prudence: "In the case of an eligible individual account plan * * *, the diversification requirement of paragraph (1)(C) and the prudence requirement (*only to the extent that it requires diversification*) of paragraph (1)(B) is not violated by acquisition or holding of * * * qualifying employer securities." 29 U.S.C. 1104(a)(2) (emphasis added).

The straightforward meaning of that provision is that the same basic duty of prudence applicable to ERISA plans generally governs the investment choices of fiduciaries of ESOPs and other eligible individual account plans. The exemptions relieve those fiduciaries *only* of the specific requirement that a plan's investment portfolio be sufficiently diversified to minimize risk. By otherwise preserving the duty of prudence for ESOPs, Congress clearly expressed its intent that the same general standard of prudence is to govern ESOP fiduciaries as other ERISA fiduciaries. That standard does not permit courts to apply any special presumption that an ESOP fiduciary acted prudently, much less a standard of review that shields a fiduciary from liability so long as the employer did not face "rare and extraordinary circumstances" on the level of "a collapse [that] would leave employees with no meaningful ownership interest in their employer." Pet. Br. 16-17, 34.

The courts of appeals that have adopted such a presumption of prudence appear to have viewed any allegation that an ESOP fiduciary acted imprudently by continuing to invest in employer stock as logically indistinguishable from a claim that the fiduciary failed

to diversify plan assets. See Pet. Br. 7 (discussing *Moench* v. *Robertson*, 62 F.3d 553, 570 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996)). That view is mistaken. The diversification exemption merely absolves ESOP fiduciaries from the ordinary obligation to reduce risk by spreading plan assets among multiple prudent investments. It does not permit them to concentrate plan assets in an *imprudent* investment, such as employer securities the fiduciary knows or should know are materially overvalued.

Some courts of appeals have also thought a presumption of prudence is warranted to resolve a perceived tension between a plan's requirement that the fiduciary invest plan assets in employer stock and ERISA's duty to invest plan assets prudently. See Pet. Br. 8 (citing *Moench*, 62 F.3d at 571-572). ERISA itself, however, resolves any such tension. As discussed above (see pp. 12-13, *supra*), a fiduciary is required to follow the terms of the plan only if it is consistent with Section 1104's fiduciary duties. 29 U.S.C. 1104(a)(1)(D). Just as a plan could not authorize a fiduciary to violate the statutory duty of loyalty, a plan cannot relax the duty of prudence. 29 U.S.C. 1110(a). Although that limitation represents a departure from the common law of trusts, it reflects ERISA's special protection for the security of employees' promised retirement benefits.

ERISA thus obligates the fiduciary of a plan that includes an ESOP option to depart from the plan's requirements if the initial investment options are no longer prudent. In fact, some ESOPs make that requirement explicit by requiring continued investment in employer stock only in conformity with ERISA's fiduciary duties. See *Rinehart* v. *Akers*, 722 F.3d 137,

145 (2d Cir. 2013) (discussing plan giving fiduciary power "to eliminate or curtail investments in [employer] [s]tock . . . *if and to the extent that* the [fiduciary] determines that such action is required in order to comply with the fiduciary duties rules" of ERISA), petition for cert. pending, No. 13-830 (filed Jan. 8, 2014) (citation omitted); cf. J.A. 387 (providing that Fifth Third's Committee must follow plan terms only "insofar as such documents and instruments are consistent with the provisions of title I of ERISA").

Accordingly, ERISA does not place ESOP fiduciaries in an "untenable position" (Pet. Br. 40) in deciding whether to follow a plan requirement to continue investing in employer stock. The duty of any ESOP fiduciary is to continue investing only if it is prudent to do so. As explained above, that standard assures fiduciaries wide latitude to make reasonable determinations in conditions of market uncertainty. For that reason, fiduciaries' decisions to continue investment in employer securities that have been declining in price, made after an adequate investigation into the soundness of the investment, should almost uniformly be upheld. See pp. 13-14, *supra*. But the prudent-person standard does not shield fiduciaries from liability when they knew, or would have known had they undertaken an adequate investigation, that the employer stock was materially overvalued.

b. Petitioners also contend (Br. 25-34) that a "robust presumption of prudence" that can be overcome only in "rare and extraordinary circumstances" follows from the statutory requirement that a fiduciary exercise the level of care that a prudent person would exercise for "an enterprise of a like character and with like aims," 29 U.S.C. 1104(a)(1)(B). That language,

however, does not support the virtually insurmountable barrier to relief that petitioners propose. The premise of petitioners' argument—that the exclusive "purpose of an ESOP is to foster employee ownership through investment in employer securities" (Br. 30), irrespective of whether those securities are materially overvalued—is fundamentally mistaken. Rather, ERISA makes clear that the exclusive "aim" of an ESOP, as of any pension plan, is to provide employee retirement benefits.

i. Like any other ERISA pension plan, an ESOP is a vehicle for retirement savings. That is clear on the face of the statute. As originally enacted, ERISA included the targeted exemptions from diversification requirements designed to enable employers to set up ESOPs. See ERISA §§ 404(a)(2), 407(b)(1), 88 Stat. 877, 880. Yet Congress did not see fit to exempt ESOPs from the requirement that fiduciaries administer plans "for the exclusive purpose of[] (i) *providing benefits to participants and their beneficiaries*; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A) (emphasis added); see ERISA § 404(a)(1)(A), 88 Stat. 877; see also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 302-303 (1974) (Conference Report). The statute nowhere permits an ESOP fiduciary to manage a plan with the objective of advancing any other goal, such as raising capital for the company and building employee equity in it.

It would therefore be at odds with the statutory text to elevate an unwritten objective of "foster[ing] employee ownership" (Pet. Br. 30) over ERISA's explicit command to operate plans with the exclusive goal of safeguarding retirement benefits—a goal that

advances Congress's overarching purpose of ensuring "the continued well-being and security of millions of employees and their dependents." 29 U.S.C. 1001(a). As the Secretary has explained in interpretive guidance, "fiduciaries may never subordinate the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the plan except in [specified] circumstances." 29 C.F.R. 2509.08-01.

Congress, moreover, has taken steps since the enactment of ERISA to improve the reliability of ESOPs as retirement vehicles. In the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1175(a)(1), 100 Stat. 2518-2519, Congress required employers to allow the partial diversification of ESOPs for older workers to protect their retirement savings. See 26 U.S.C. 401(a)(28). And as petitioners acknowledge only in a footnote, the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, "requires certain [ESOPs] to provide participants with the right to diversify their investments." Pet. Br. 36 n.14. Those statutory provisions reflect Congress's continued understanding that an ESOP, like any ERISA plan, serves primarily as a retirement-savings vehicle.

Some believe that by building employee equity in a company, ESOPs give employees a sense of ownership in their employer, which may have salutary effects on the efficiency and cohesiveness of the workforce. See ESOP Ass'n Amicus Br. 24. And by encouraging employees to invest their earnings in the company, ESOPs help employers raise capital. See Chamber of Commerce Amicus Br. 6. But Congress sought to advance those objectives through the ESOP-specific exemptions set forth in the text of the statute, as well

as certain tax benefits to facilitate the formation of ESOPs. Congress did not permit fiduciaries appointed to administer ESOPs, once they are established, to make investment decisions on the basis of the fiduciaries' perception or assessment of such generalized policy considerations. Instead, Congress applied to ESOPs, as to other plans, the requirement that the plan be administered for the "exclusive purpose" of "providing benefits to participants and their beneficiaries" and defraying administrative expenses. 29 U.S.C. 1104(a)(1)(A). An investment decision that subordinates that interest to other goals violates the duties of both prudence *and* loyalty.

ii. No other provision of ERISA supports petitioners' view that a fiduciary must administer an ESOP with the principal aim of raising capital for and building employee ownership in their company without regard to the effect of that investment on their retirement savings. Petitioners principally rely (Br. 6, 18, 21, 26, 38, 40) on a mere expression of congressional intent in a subsection of a complex tax statute enacted two years after ERISA in which Congress cautioned against "regulations and rulings which treat employee stock ownership plans as conventional retirement plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1583, 1590 (reprinted at 26 U.S.C. 4975 note). The cited subsection does not suggest that a fiduciary administering an ESOP may subordinate the statutory objective of providing retirement benefits to the goal of building employee ownership in the company (much less do so at all costs), nor does it discuss the proper interpretation and enforcement of ERISA's fiduciary duties more generally. The expression of intent was instead di-

rected at specific provisions of proposed regulations relating to ESOP loans, stock options, voting rights, and the like, which were perceived to be too onerous. See S. Conf. Rep. No. 1236, 94th Cong., 2d Sess. 539, 542 (1976). Indeed, the Conference Report cautioned that no inference about Congress's intent should be drawn even with respect to provisions of the proposed regulations, if they were not commented upon. *Id.* at 542. The 1976 statute manifestly does not suggest that Congress intended to disapprove of the application to ESOPs of the basic *statutory* duty of prudence.

Petitioners also advert (Br. 36) to Internal Revenue Code provisions favoring ESOPs. ESOPs' tax-favored treatment, however, only underscores the importance of steadfastly enforcing the duty of prudence that Congress did not see fit to relax for ESOPs. Congress surely did not intend to provide tax benefits to plans that invest their employees' retirement savings in securities that are materially overpriced as a result of market misrepresentations.

Other citations in petitioners' brief are similarly inapposite. Petitioners take out of context a sentence fragment from ERISA's Conference Report discussing an exemption from ERISA's prohibited-transactions provisions (see 29 U.S.C. 1106-1108) for loans to a subclass of ESOPs ("leveraged" ESOPs). The passage states only that a frequent characteristic of such plans is that they are "designed to build equity ownership of shares of the employer corporation for its employees *in a nondiscriminatory manner*." Conference Report 313 (emphasis added) (quoted in part at Pet. Br. 26). The Conference Committee stressed the narrow scope of the exception and the need for "special scrutiny" to ensure that the transac-

tions are primarily for the benefit of plan participants and beneficiaries, *ibid.*, and hence did not suggest that the basic rule of prudence does not apply to ESOPs. Petitioners also cite (Br. 27) a special report of a Senate subcommittee published sixteen years after ERISA was enacted and that did not accompany any legislation. See Staff of the Senate Special Comm. on Aging, 101st Cong., 2d Sess., *Developments in Aging: 1989 Volume 1*, at 94-96 (Comm. Print 1990). The short discussion of ESOPs in that report explained only that the Tax Reform Act of 1986 required employers to allow the partial diversification of ESOPs for older workers to protect their retirement savings.

Aside from those sources, petitioners rely (Br. 27, 38 n.15) on a committee staff report issued six years after ERISA's enactment indicating that an ESOP is not "primarily" a retirement vehicle, and a Senator's 1983 floor statement introducing a bill that was never enacted. It is telling that these scattered statements over the decades since ERISA's enactment are all petitioners have been able to muster for the view that, notwithstanding the explicit text of ERISA itself, Congress intended courts to apply a virtually insurmountable presumption of prudence for ESOP fiduciaries.

iii. Accordingly, in determining whether a fiduciary administered an ESOP in the way that a prudent person would manage "an enterprise of a like character and with like aims," 29 U.S.C. 1104(a)(1)(B), a court must consider how a prudent person would operate a fund that, although exempt from strict diversification requirements if invested in employer securities, nevertheless has the "exclusive purpose" of providing retirement benefits to participants (and

defraying administrative expenses), 29 U.S.C. 1104(a)(1)(A). A prudent person administering such a fund would not continue to make investments in assets she knows, or should know, are materially overpriced. Petitioners are therefore wrong in arguing that the prudent-person standard requires a court to countenance continued investment in artificially inflated employer stock (with the resulting diminishment in the value of employees' retirement savings) so long as the company was not on the brink of collapse.

c. Petitioners point (Br. 30-34) to the "deviation doctrine" in the common law of trusts. As described by petitioners, that doctrine requires a trustee to follow the terms of the trust "unless compliance is impossible or illegal or there has been such a change of circumstances that compliance would defeat or substantially impair the accomplishment of the trust purposes." *Id.* at 32 (citation and internal quotation marks omitted). But as discussed above, see pp. 12-13, *supra*, Congress directed that ERISA's fiduciary duties trump contrary plan terms, 29 U.S.C. 1104(a)(1)(D), specifically to address the problem that "the trust law in many states" had shielded trustees from liability for investment decisions "if the settlor specifie[d] that the trustee shall be allowed to make investments which might otherwise be considered imprudent." Senate Report 29; see House Report 12 (same). The incorporation of the "deviation doctrine" into ERISA in the way petitioners urge would effectively overturn Congress's deliberate decision to depart from trust law in that respect. Indeed, petitioners' line of reasoning would support a nearly irrebuttable presumption of prudence not only for ESOPs, but for any plan specifying that certain investment

funds will be offered to plan participants, regardless of whether those options are prudent or sufficiently diversified. That plainly is not what Congress envisioned when it enacted Section 1104(a)(1)(D). And in fact, the deviation doctrine, as set forth in the passage quoted by petitioners above, requires a trustee to follow the terms of the trust "unless compliance is * * * illegal" (Pet. Br. 32); here Section 1104(a)(1)(D) renders it illegal for a fiduciary to follow the terms of the plan if it would be imprudent to do so.

d. Petitioners also try to draw an analogy between the presumption of prudence and the abuse-of-discretion standard that courts apply in reviewing individual benefit determinations by plan fiduciaries who have been vested with discretion to decide claims or to interpret the terms of a plan. See Pet. Br. 41-42 (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989)); see *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 111 (2008). That analogy is inapt, because the abuse-of-discretion standard does not pose the virtually insurmountable hurdle to recovery that petitioners urge. But more fundamentally, this Court developed the abuse-of-discretion standard because "ERISA does not set out the appropriate standard of review for actions * * * challenging benefit eligibility determinations." *Firestone Tire & Rubber Co.*, 489 U.S. at 109. In contrast, Congress has expressly prescribed the standard to be applied to claims of fiduciary mismanagement: the prudent-person standard. That standard does not demand "rare and extraordinary circumstances" before an investment can be deemed imprudent.

e. Finally, petitioners emphasize (Br. 22-23, 35) that a presumption of prudence was first articulated

by the Third Circuit in 1995 and has recently been adopted by five other courts of appeals. The Department of Labor, however, has consistently taken the position that "fiduciaries are obligated to follow plan terms[] requiring investment in employer stock only to the extent that doing so is otherwise consistent with fiduciary duties" and has opposed the sort of preclusive presumption that petitioners favor. Secretary of Labor Amicus Br., 2006 WL 5952409, at *10, *Kirschbaum* v. *Reliant Energy, Inc.* (5th Cir. Aug. 17, 2006); see, *e.g.*, Secretary of Labor Amicus Br., 1994 WL 16012393, at *9-*23, *Moench*, *supra* (3d Cir. 1994). That longstanding view is entitled to some weight. See *Mead Corp.* v. *Tilley*, 490 U.S. 714, 722 (1989).

3. Petitioners' policy rationales do not justify a presumption of prudence

Petitioners and their amici identify various policy reasons that in their view support a nearly absolute presumption of prudence. Those policy assertions do not warrant a judicially fashioned barrier to relief that has no mooring in ERISA's text.

a. Petitioners predict that without a presumption of prudence, ESOP fiduciaries will be subject to liability because the company's "share price fell." Pet. Br. 16; see *id.* at 17-18, 24, 34, 51. That concern miscomprehends the prudent-person standard. Just as with fiduciaries of other types of ERISA plans, see pp. 13-14, *supra*, a claim that the price of a publicly traded stock decreased, even substantially, is insufficient to state a claim against an ESOP fiduciary.

Amicus Delta Airlines (Br. 5) is therefore correct that "[w]hen there is no allegation that a company's stock price reflected anything other than its true value, claims challenging a plan fiduciary's investment

in employer stock" should typically be dismissed. But where a plaintiff plausibly alleges that the fiduciary *knew*, or *should have known*, that the employer stock "traded at an artificially inflated price due to fraud, improper accounting practices, overvaluation of assets, or material misstatements about the company's prospects," *id.* at 7, and yet neither stopped investing in it and offering it as an investment option, nor made corrective disclosures so that plan participants could decide to stop investing in it, he has stated a claim for breach of fiduciary duty. Petitioners' extreme position—that even when fiduciaries know that the company's financial statements do not reflect its true financial health and the market price therefore does not accurately reflect the actual value of the stock, they *never* have an obligation to take action to protect plan participants unless the company is on the "brink of collapse" (Br. 34 (citation omitted))—would thwart the basic objective of ERISA to promote retirement security.

Petitioners and their amici cite what they see as a significant number of meritless suits against ESOP fiduciaries. See, *e.g.*, Chamber of Commerce Amicus Br. 18-21. Even if their characterizations of those suits are accurate, however, any decision to heighten the ordinary pleading standards in this context should be made by Congress. Cf. *e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. And in any event, permitting suits based on "allegations that the share price was overvalued and the fiduciaries knew of that overvaluation" will not open the door to baseless claims. Delta Airlines Amicus Br. 18.

b. Petitioners further contend that "insufficient deference to ESOP fiduciaries would give rise to unintended and avoidable conflicts with securities law." Pet. Br. 42 (capitalization altered). That argument also lacks merit.

i. Petitioners argue that without a presumption of prudence, a fiduciary who is also a corporate insider might be forced to violate the securities laws by trading on inside information on behalf of plan participants. It is true that a fiduciary may not sell stock on behalf of participants, or notify participants that they should do so, based on inside information. See 15 U.S.C. 77q(a); 78j(b); 17 C.F.R. 240.10b-5. That securities-law limitation restricts the range of options that an ESOP fiduciary who is also a corporate insider may have available to fulfill his obligation to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). But it does not leave him without options. As petitioners acknowledge (Br. 43), a fiduciary can publicly disclose information to the market that brings the price of the employer stock in line with its value, cease further purchases of the stock, or both. Cf. 29 U.S.C. 1021(i)(2)(C)(i) and (7)(B)(i) (provisions relating to suspension of plan trading due to ERISA's fiduciary duties or the securities laws). The fiduciary can also alert the proper regulatory agencies, such as the Securities and Exchange Commission (SEC) or the Department of Labor, to any alleged misstatements in securities filings. Those courses do not violate the securities laws.

Petitioners argue that public disclosure would decrease the value of the assets already held by the plan. That would be true if the price has been artificially

inflated by the company's public misrepresentations. But if so, a similar or greater drop might well occur if correction of the misrepresentations were delayed—potentially months or years later, after even more of the employees' retirement savings have been invested in the overpriced assets. It better serves the interests of the plan participants if the fiduciaries take immediate actions to bring the price of the stock in line with its true value by disclosing the material nonpublic information.

Petitioners contend (Br. 44) that if a fiduciary stops investing in employer stock without disclosing the information to the market, the market could overreact and cause the price to drop by more than it would if the information was disclosed. That might be so. A prudent fiduciary, therefore, should use her judgment to determine whether public disclosure in conjunction with a cessation in purchasing would better fulfill her obligations to plan participants and their beneficiaries. The timing and consequences of public disclosure, moreover, should be taken into account in computing any damages awarded for a breach of the duty of prudence.

ii. Petitioners also maintain (Br. 44) that without a presumption of prudence, corporations will be required to disclose material nonpublic information at earlier times than when disclosure is required by the securities laws. That is not so. The Department of Labor does not take the position that an ESOP fiduciary, to avoid liability for a breach of the duty of prudence, must disclose information to the public sooner than when federal securities laws would require disclosure. For example, certain triggering events must be disclosed through SEC *Form 8-K* within four busi-

ness days of their occurrence. Other information must be disclosed quarterly or annually through *Form 10-K* and *Form 10-Q*. The securities laws reflect a reasonable judgment about how soon particular categories of information must be disclosed to investors, and it is sensible to interpret ERISA's duty of prudence harmoniously with those requirements.

But where, as here, it is plausibly alleged that the fiduciaries knew, or would have known if they had conducted an adequate investigation, that the company was making material misstatements to the public about the soundness of its business—*i.e.*, that the corporate insiders were *violating* the securities laws—no justification exists to shield them from liability to plan participants who entrusted the fiduciaries with their retirement savings. The securities laws certainly do not require that result.

iii. Even if corporate officers who are ESOP fiduciaries were required in some respects to adhere to stricter obligations than what the securities laws require, that would be a consequence of the corporation's own decision to establish an ESOP and to install its officers as plan fiduciaries. There is nothing remarkable about the fact that the decision to take on strict fiduciary obligations to plan participants would limit the range of options available to corporate insiders with respect to the disclosure of inside information.

In any event, the consequences that petitioners posit can largely be avoided if an employer assigns a non-insider, such as an outside financial institution, to be the investment fiduciary of the ESOP. Although a designated employee of the company or another person would have responsibility for monitoring the per-

formance of the investment fiduciary, and would therefore have a fiduciary duty to keep the trustee informed of any pertinent information, the company could place a person in that role who is not likely to know material inside information.

More generally, in light of the common-law origins and statutory purposes of ERISA, it would be anomalous if the fact that some ESOP fiduciaries are corporate insiders gave rise to a more lenient standard of prudence. At common law, a trustee corporation's "peculiar knowledge of the value of [its own] shares [was] a factor to be considered in determining whether the making or the retention of an investment in its own shares is negligent." 2 *Scott* § 170.15, at 1339. And ERISA's legislative history expressed the concern that "where the investments may inure to the direct or indirect benefit of the plan sponsor * * * participants might be subject to pressure with respect to investment decisions." Conference Report 305. It is therefore difficult to believe, as petitioners contend, that Congress would have intended courts to almost completely defer to employers in this context.

4. No reason exists to apply a presumption of prudence at the summary-judgment or trial stages either

The Sixth Circuit has conceived of the presumption of prudence as a framework for weighing evidence and therefore has not required plaintiffs to plead facts overcoming the presumption. Pet. App. 11-12; *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 592-593, cert. denied, 133 S. Ct. 758 (2012). But it has nevertheless stated that the presumption imposes a "demanding burden" on plaintiffs at the summary-judgment and factfinding stages. *Pfeil*, 671 F.3d at

595. Although that version of the presumption is preferable to a standard in which a plaintiff would have to plead "rare and extraordinary circumstances" (Pet. Br. 34), it is inconsistent with ERISA as well.

Courts sometimes impose special evidentiary presumptions when the party who would otherwise bear the burden of proof is poorly positioned to establish a particular fact—for example, because "the facts with regard to an issue lie peculiarly in the knowledge of [the other] party." *Smith* v. *United States*, 133 S. Ct. 714, 720 (2013) (citation omitted); see, *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-803 (1973). Evidentiary presumptions also can be justified by "considerations of fairness, public policy, and probability, as well as judicial economy." *United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 174 (1993) (internal quotation marks and citation omitted).

Those considerations do not justify any special presumption in the context of claims that ESOP fiduciaries breached the duty of prudence by continuing to invest in employer stock. The burden of alleging and proving a breach of the fiduciary duty of prudence already rests with the plaintiff.[5] However it is articulated, therefore, the only function of a special presumption would be to establish a threshold for proving the plaintiff's claim greater than that required to show by a preponderance of the evidence that the fiduciary knew or reasonably should have known that

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[5] Some courts of appeals have held that once a plaintiff has demonstrated a breach of fiduciary duty and made a prima facie showing of loss, the burden shifts to the fiduciary to prove that a loss would have occurred even without the breach. See, *e.g.*, *Martin* v. *Feilen*, 965 F.2d 660, 671 (8th Cir. 1992), cert. denied, 506 U.S. 1054 (1993).

the employer securities were materially overvalued. Such a heightened burden would be particularly onerous in this context given that the critical question is often whether the defendants failed to conduct an adequate investigation—information uniquely within the defendants' possession. The only purpose of increasing the burden on the plaintiff would thus be simply to make claims arising out of ESOP investment decisions very difficult to win. That is not a justification for a judicially fashioned presumption.

B. Respondents Stated A Claim For Breach Of ERISA's Duty Of Prudence

Respondents' complaint (J.A. 15-117) adequately stated a claim for breach of the duty of prudence. Their detailed allegations did not rest on a "mere decline in stock price." Pet. Br. 17, 34. The gravamen of their claims was that petitioners knew—or, if they had conducted a reasonable investigation, would have known—that Fifth Third stock was not worth what the Plan was paying for it, in large part because the company's subprime mortgage lending practice was misleadingly or insufficiently disclosed. Pet. App. 4-5; J.A. 98-104.

That claim was supported by detailed allegations. Respondents alleged, for example, that in publicly describing what types of mortgages were contained in Fifth Third's loan portfolio, petitioners failed to disclose "the Company's internal working definition of 'prime,' which was utterly and completely inconsistent with commonly accepted definitions of the term within the banking industry." J.A. 57. They also alleged that the company did not disclose that it had been originating loans in which the borrowers did not meet the requisite qualifications. J.A. 63. Fifth Third's portfo-

lio, they claimed, "was riddled with under-collateralized loans issued to borrowers that lacked sufficient incomes or assets to repay their loans." J.A. 65.

Respondents further alleged that petitioners, due to their positions within the company, knew about these problems and numerous others detailed in the complaint. J.A. 86-87, 98-99, 102. They claimed that petitioners "failed to conduct an appropriate investigation into whether Fifth Third Stock was a prudent investment for the Plan and, in connection therewith, failed to provide Plan participants and beneficiaries with information regarding Fifth Third's problems so that participants could make informed decisions." J.A. 87-88, 99. Petitioners, they maintained, could have taken such actions as "discontinuing further contributions to and/or investment in Fifth Third Stock" or "consulting with the [Department of Labor] or independent fiduciaries regarding appropriate measures." J.A. 88-89, 103. But petitioners "failed to take any action to protect participants." J.A. 89. As a result, "[t]he Plan suffered millions of dollars in principal losses." J.A. 113.

Those allegations are not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Fifth Third may not have been on the "brink of collapse," and thus petitioners' "rare and extraordinary circumstances" test would not be met. But respondents have sufficiently alleged that petitioners invested employees' retirement savings in securities that they knew or reasonably should have known were materially overpriced. That suffices to state a claim for breach of the duty of prudence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
G. WILLIAM SCOTT
Acting Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
THOMAS TSO
Attorney
Department of Labor

MARCH 2014

STATUTORY APPENDIX

1. Section 803(h) of the Tax Reform Act of 1976, Public Law No. 94-455 provides:

TITLE VIII—CAPITAL FORMATION

* * * * *

Sec. 803. EMPLOYEE STOCK OWNERSHIP PLANS; STUDY OF EXPANDED STOCK OWNERSHIP

* * * * *

(h) INTENT OF CONGRESS CONCERNING EMPLOYEE STOCK OWNERSHIP PLANS.—The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, the Employee Retirement Income Security ACT of 1974, the Trade Act of 1974, and the Tax Reduction Act of 1975) and this Act has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. Because of the special purposes for which employee stock ownership plans are established, it is consistent with the intent of Congress to permit these plans (whether structured as

pension, stock bonus, or profit–sharing plans) to distribute income on employer securities currently.

2. 29 U.S.C. 1001 provides:

Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establish-

ment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

3. 29 U.S.C. 1002 provides in pertinent part:

Definitions

For purposes of this subchapter:

* * * * *

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in

the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan

covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

4. 29 U.S.C. 1104 provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary

exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with

such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of

the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

5. 29 U.S.C. 1106(a) provides:

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he

knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

6. 29 U.S.C. 1107 provides:

Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2)(A) If this paragraph applies to an eligible individual account plan, the portion of such plan which consists of applicable elective deferrals (and earnings allocable thereto) shall be treated as a separate plan—

(i) which is not an eligible individual account plan, and

(ii) to which the requirements of this section apply.

(B)(i) This paragraph shall apply to any eligible individual account plan if any portion of the plan's applicable elective deferrals (or earnings allocable thereto) are required to be invested in qualifying employer securities or qualifying employer real property or both—

(I) pursuant to the terms of the plan, or

(II) at the direction of a person other than the participant on whose behalf such elective deferrals are made to the plan (or a beneficiary).

(ii) This paragraph shall not apply to an individual account plan for a plan year if, on the last day of the preceding plan year, the fair market value of the assets of all individual account plans maintained by the employer equals not more than 10 percent of the fair market value of the assets of all pension plans (other than multiemployer plans) maintained by the employer.

(iii) This paragraph shall not apply to an individual account plan that is an employee stock ownership plan as defined in section 4975(e)(7) of Title 26.

(iv) This paragraph shall not apply to an individual account plan if, pursuant to the terms of the plan, the portion of any employee's applicable elective deferrals which is required to be invested in qualifying employer securities and qualifying employer real property for

any year may not exceed 1 percent of the employee's compensation which is taken into account under the plan in determining the maximum amount of the employee's applicable elective deferrals for such year.

(C) For purposes of this paragraph, the term "applicable elective deferral" means any elective deferral (as defined in section 402(g)(3)(A) of Title 26) which is made pursuant to a qualified cash or deferred arrangement as defined in section 401(k) of Title 26.

(3) CROSS REFERENCES —

(A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 1104(a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

(D) For diversification requirements for qualifying employer securities held in certain individual account plans, see section 1054(j) of this title.

(c) Election

(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of—

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) Definitions

For purposes of this section—

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan;

(ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

(4) The term "qualifying employer real property" means parcels of employer real property—

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is—

(A) stock,

(B) a marketable obligation (as defined in subsection (e) of this section), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of Title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfies the requirements of subsection (f)(1) of this section.

(6) The term "employee stock ownership plan" means an individual account plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase

plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

(9) For purposes of this section, an arrangement which consists of a defined benefit plan and an indi-

vidual account plan shall be treated as 1 plan if the benefits of such individual account plan are taken into account in determining the benefits payable under such defined benefit plan.

(e) Marketable obligations

For purposes of subsection (d)(5) of this section, the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if—

(1) such obligation is acquired—

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) immediately following acquisition of such obligation—

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

(f) Maximum percentage of stock held by plan; time of holding or acquisition; necessity of legally binding contract

(1) Stock satisfies the requirements of this paragraph if, immediately following the acquisition of such stock—

(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

(2) Until January 1, 1993, a plan shall not be treated as violating subsection (a) of this section solely by

holding stock which fails to satisfy the requirements of paragraph (1) if such stock—

(A) has been so held since December 17, 1987, or

(B) was acquired after December 17, 1987, pursuant to a legally binding contract in effect on December 17, 1987, and has been so held at all times after the acquisition.

7. 29 U.S.C. 1108(e) provides:

Exemptions from prohibited transactions

* * * * *

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

8. 29 U.S.C. 1110(a) provides:

Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

9. 29 C.F.R. 2550.404a-1 provides:

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

* * * * *

Investment duties.

(a) In general. Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (the Act) provides, in part, that a fiduciary shall discharge his duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) *Investment duties.*

(1) With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary:

(i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and

(ii) Has acted accordingly.

(2) For purposes of paragraph (b)(1) of this section, "appropriate consideration" shall include, but is not necessarily limited to,

(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and

(ii) Consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.

(3) An investment manager appointed, pursuant to the provisions of section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if—

(i) Such information is provided for the stated purpose of assisting the manager in the performance of his investment duties, and

(ii) The manager does not know and has no reason to know that the information is incorrect.

(c) *Definitions.* For purposes of this section:

(1) The term investment duties means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act.

(2) The term investment course of action means any series or program of investments or actions related to a fiduciary's performance of his investment duties.

(3) The term plan means an employee benefit plan to which title I of the Act applies.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-751

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IN THE SUPREME COURT OF THE UNITED STATES

FIFTH THIRD BANCORP, et al.,

Petitioners,

v.

JOHN DUDENHOEFFER, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENTS

JAY E. SUSHELSKY*
AARP FOUNDATION
LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record* for
Amicus Curiae

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TABLE OF AUTHORITIES

Cases

Armstrong v. LaSalle Bank Nat'l Assoc.,
446 F.3d 728 (7th Cir. 2006) 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 30, 31

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 30, 31

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 28

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir. 1982) 28

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 22

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 28

Fink v. Nat'l Sav. & Trust Co.,
772 F.2d 951 (D.C. Cir. 1985) 22

Humphreys v. Roche Biomedical Labs., Inc.,
990 F.2d 1078 (8th Cir. 1993) 29

In re Elec. Data Sys. Corp. ERISA Litig.,
305 F. Supp. 2d 658 (E.D. Tex. 2004) 30, 32

In re RadioShack Corp. "ERISA" Litig.,
547 F. Supp. 2d 606 (N.D. Tex. 2008) 28

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008) 26

Kopp v. Klein,
722 F.3d 327 (5th Cir. 2013) 26

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995) 24, 25

Lalonde v. Textron, Inc.,
369 F.3d 1 (1st Cir. 2004) 26

LaRue v. DeWolff, Boberg & Associates,
552 U.S. 248 (2008) 4, 12, 19

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 18

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) ..... *passim*

Nachman Corp. v. PBGC,
446 U.S. 359 (1980) 27

Pfiel v. State Street Bank & Trust Co.,
671 F.3d 585 (6th Cir. 2012) 25

Quan v. Computer Sci. Corp.,
623 F.3d 870 (9th Cir. 2009) 26

Rankin v. Rots,
278 F. Supp. 2d 853 (E.D. Mich. 2003) 25

Stein v. Smith,
270 F. Supp. 2d 157 (D. Mass. 2003) 32

Steinman v. Hicks,
352 F.3d 1101 (7th Cir. 2003) 26, 27

Swierkiewicz v. Sorema N. A.,
534 U.S. 506 (2002) 31, 32

Venture Assocs. Corp. v. Zenith Data Sys. Corp.,
987 F.2d 429 (7th Cir. 1993) 29

Vivien v. WorldCom, Inc.,
2002 WL 31640557 (N.D. Cal. July 26, 2002) 31

White v. Marshall,
714 F.3d 980 (7th Cir. 2013) 21

Statutes, Rules and Regulations

Employee Retirement Income Security Act (ERISA),
§ 1001, 29 U.S.C. § 1001 1
§ 404, 29 U.S.C. § 1104 22
§ 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 1
§ 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 23
§ 404(a)(2), 29 U.S.C. § 1104(a)(2) 3, 22
§ 406, 29 U.S.C. § 1106 27
§ 407, 29 U.S.C. § 1107 27

Pension Protection Act of 2006 11

Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (Nov. 6, 1978), § 135(a) 19

Tax Reform Act of 1976 17

Legislative History

Senate Special Committee on Aging, Developments in Aging: 1989, S. Rep. No. 101-249 (1990) 18

Staff of S. Committee on Finance, Employee Stock Ownership Plans, 96th Cong., 2d Sess. (Comm. Print 1980) 18

Miscellaneous

American Benefits Council, *401(k) fast facts* (Apr. 2013), *available at* http://www.council.org/documents2013/401k_stats.pdf 5

Amicus Br. of Chamber of Commerce 17

Amicus Br. of ESOP Ass'n 19

Stephanie Armour, *Enron woes reverberate through lives*, USA TODAY (Jan. 27, 2006), *available at* http://usatoday30.usatoday.com/money/industrys/energy/2006-01-25-enron-employees-usat_x.htm?csp=34 ..... 13, 14

Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus & Cass R. Sunstein, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & ECON. 45 (2007) 11, 16

David Blanchett, *Employer Stock Ownership in 401(k) Plans and Subsequent Company Stock Performance*, MORNINGSTAR INVESTMENT MANAGEMENT (July 2013), https://corporate.morningstar.com/us/documents/MethodologyDocuments/ResearchPapers/Employer-Stock-Ownership-in-401k-Plans.pdf..... 7, 8, 9, 10

Rick Bragg, *ENRON'S COLLAPSE: WORKERS; Workers Feel Pain of Layoffs And Added Sting of Betrayal*, N.Y. TIMES (Jan. 2002), *available at* http://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting-betrayal.html 15

Gary V. Engelhardt, *The Pension Protection Act of 2006 and Diversification of Employer Stock in Defined Contribution Plans* (Ctr. For Ret. Research, CRR WP 2011-20, Nov. 2011), *available at* http://crr.bc.edu/working-papers/the-pension-protection-act-of-2006-and-diversification-of-employer-stock-in-defined-contribution-plans/..... 7

Scott Horsley, *Bear Stearns Collapse Costly to Many*, NPR (Mar. 17, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=88415073 14

Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States* (Nat'l Bureau of Econ. Research, NBER Working Paper No. 17108, 2011), *available at* http://www.nber.org/papers/w17108 11

Craig R. M. McKenzie, *Misunderstanding Savings Growth: Implications for Retirement Savings Behavior*, JOURNAL OF MARKETING RESEARCH (2011), *available at* http://www.marketingpower.com/aboutama/documents/jmr_forthcoming/misunderstanding_savings_growth.pdf 12

Olivia S. Mitchell & Stephen P. Utkus, *Company Stock and Retirement Plan Diversification* (Pension Research Council of the Wharton Sch. Of the Univ. of Penn., PRC WP 2002-4, 2002), *available at* https://institutional.vanguard.com/iam/pdf/CRR_company_stock.pdf 9

Richard A. Oppel Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. TIMES (Nov. 2001), *available at* http://www.nytimes.com/2001/11/22/business/employees-retirement-plan-is-a-victim-as-enron-tumbles.html 15

Steve Paulson, *Workers lose jobs, health care and savings at Enron*, WSWS (Jan. 2002), https://www.wsws.org/en/articles/2002/01/enro-j14.html 15

PATRICK J. PURCELL, CONG. RESEARCH SERV., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans: Investment Risk and Retirement and Retirement Security* (2003), http://congressionalresearch.com/RL31507/document.php?study=Employer+++Retirement+Plans+investment+Risk+and+Retirement+Security 13

Patrick Purcell & Debra B. Whitman, Cong. Research Serv., Rl33845, *Retirement Savings: How Much Will Workers Have When They Retire*? (2007), *available at* http://research.policyarchive.org /3111.pdf 5

Petitioners' Brief 17, 18

David E. Rovella, *MCI, WorldCom's Ebbers Settle 401K Suit for $51 Mln (Update2)* Bloomberg, July 6, 2004, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqypuAjvRgpk 13

Colette Thayer, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older* (2008), *available at* http://www.aarp.org/work/retirement-planning/info-10-2008/retirement_survey_08.html 14

Stephen P. Utkus & Jean A. Young, *The evolution of company stock in defined contribution plans*, VANGUARD (Mar. 2012), *available at* https://institutional.vanguard.com/iam/pdf/CRREVO.pdf?cbdForceDomain=false ..... *passim*

U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2010 Form 5500 Annual Reports* (June 2013), http://www.dol.gov/ebsa/pdf/2011pensionplanbulletin.pdf 5

Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2012* (Employee Benefits Research Inst., Issue Brief No. 394, 2012), *available at* http://www.ebri.org/pdf/briefs pdf/EBRI_IB_012-13.No394.401k-Update-2012.pdf 5, 6, 7

Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004) 4

INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

The protections afforded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, are of vital concern to workers of all ages and to retirees, as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. It is important to ERISA plan participants to ensure that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of amicus briefs and have filed letters reflecting their blanket consent with the Clerk of the Court.

(a)(1)(A). To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets.

Given the primacy of defined contribution plans in the American workplace, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently. Accordingly, resolution of the issues in this case will have a direct and vital bearing on plan participants' ability to protect their retirement accounts from mismanagement and to ensure economic security in retirement. In light of the significance of the issues presented by this case, AARP respectfully submits this brief, as amicus curiae, to facilitate a full consideration by the Court.

SUMMARY OF ARGUMENT

Defined contribution plans are now the predominant type of employer-sponsored retirement plans. Millions of participants are enrolled in employer-sponsored defined contribution plans that offer employer stock as an investment option, a matching contribution, or both. It is crucial that fiduciaries of these plans adhere to ERISA fiduciaries' duty of prudence in monitoring the plan's retention of employer stock as an investment option. ERISA's legislative history lends no support to Petitioner's argument in favor of a presumption of prudence for ESOP fiduciaries.

An ESOP fiduciary is exempt from the prudence standard only insofar as diversification from employer stock is concerned. Section 404(a)(2) does not exempt ERISA fiduciaries from the duty to exercise prudence in all investment matters, much less in the decision to permit the retention of employer stock as a plan investment option. Thus the retention of qualified employer stock may be imprudent for reasons other than non-diversification. ERISA's "care, skill, prudence, and diligence" requirement remains fully applicable, and no presumption as to any one of those fiduciary attributes or duties applies. If the Court is inclined to find that the *Moench* presumption has any application, then it should be applied only as an evidentiary standard. This Court should not insulate ESOP fiduciaries from meaningful judicial review by imposing an insurmountable pleading requirement on injured participants in company-stock plans.

ARGUMENT

I. WITH DEFINED CONTRIBUTION PLANS BEING THE PRIMARY FORM OF EMPLOYER-SPONSORED RETIREMENT PLANS, PLAN FIDUCIARIES MUST ADHERE TO ERISA'S DUTY OF PRUDENCE IN MONITORING THE PLAN'S RETENTION OF EMPLOYER STOCK AS AN INVESTMENT OPTION.

A. Defined Contribution Plans Are The Primary Vehicle For Retirement Savings Today.

In *LaRue v. DeWolff, Boberg & Associates*, this Court recognized that "[d]efined contribution plans dominate the retirement plan scene today." 552 U.S. 248, 255 (2008). In contrast to the era of ERISA's enactment, the traditional regime of defined benefit plans has waned in recent years, both in terms of the number of plans and the number of participants enrolled in those plans. *Id.* The number of participants in employer-sponsored defined contribution plans and the magnitude of assets held by those plans are significant. The defined contribution paradigm is entrenched in today's retirement, tax and social policy, and it has changed the way that American workers form and implement plans to finance their retirement. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 457-58 (2004).

According to the most recent statistics released by the U.S. Department of Labor, more than 88 million participants are currently covered by the 638,390 defined contribution plans in existence. *See* U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2010 Form 5500 Annual Reports* (June 2013), http://www.dol.gov/ebsa/pdf/2011pensionplanbulletin.pdf. The total assets held by these plans exceeded $4.2 trillion as of the third quarter of 2012. *Id.* A recent survey indicates that 79% of respondents believe that their defined contribution plans can help them to meet their retirement goals.[2] *See* American Benefits Council, *401(k) fast facts* (Apr. 2013), *available at* http://www.americanbenefitscouncil.org/documents2013/401k_stats.pdf.

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[2] Widespread public support for the defined contribution regime is well-founded in theory. A 2007 study by the Congressional Research Service reveals that a participant could save an average of $468,000 by age 65, but only if he or she contributes 8% of earnings each year for 30 years (starting at age 35) to an account that invests in a combination of stocks and bonds earning a 5.5% annual return. Patrick Purcell & Debra B. Whitman, Cong. Research Serv., RI33845, *Retirement Savings: How Much Will Workers Have When They Retire?* (2007), *available at* http://research.policyarchive.org/3111.pdf. However, a 2012 survey showed that employees over age 60 with the longest tenures only had $250,000 in their account balances. *See* Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2012* at 11 (Employee Benefits Research Inst., Issue Brief No. 394, 2012), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_012-13.No394.401k-Update-2012.pdf.

B. Millions of Participants Are Enrolled In Employer-Sponsored Defined Contribution Plans That Offer Employer Stock As An Investment Option, A Matching Contribution, Or Both.

Within the realm of workplace retirement plans are defined contribution plans that feature employer securities as an available investment option. Company stock plans, as part of the employment bargain, offer plan participants stock in their own employer, either as an investment option, a matching contribution or both, depending on the terms of the particular employer's plan. Employer stock might be offered as simply another investment option within a plan, or it can be offered as part of an ESOP.[3] While it is rare for a small employer to adopt a plan that features an employer stock option, nearly 60% of participants enrolled in large employer plans covering at least 5000 participants were offered employer stock as an investment option in 2011. *See* Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2012* at 8 (Employee

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[3] An ESOP is usually a stand-alone plan that invests funds primarily in employer securities and is financed exclusively by employer contributions. Stephen P. Utkus & Jean A. Young, *The evolution of company stock in defined contribution plans*, VANGUARD at 4 (Mar. 2012), available at https://institutional.vanguard.com/iam/pdf/CRREVO.pdf?cbdForceDomain=false. An ESOP can also be combined with a 401(k) plan, referred to as a "KSOP." *Id.* An ESOP "encourages concentrated single-stock risk as a mechanism for fostering alignment of employee interests with those of the company and its owners." *Id.*

Benefits Research Inst., Issue Brief No. 394, 2012), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_012-13.No394.401k-Update-2012.pdf (hereinafter VanDerhei, Holden, Alonso & Bass).

A study by the Vanguard Group confirms that company stock plans tend to be larger, "with a median participant population of 2,399 versus 205 for non-company stock plans." Stephen P. Utkus & Jean A. Young, *The evolution of company stock in defined contribution plans* at 6, VANGUARD (Mar. 2012), *available at* https://institutional.vanguard.com/iam/pdf/CRREVO.pdf?cbdForceDomain=false (hereinafter "Utkus & Young"). At the close of 2012, approximately 36% of participants were enrolled in plans that offered employer securities as an investment option under the terms of the plan. *See* VanDerhei, Holden, Alonso & Bass, *supra,* at 19. More than half of employees who are offered company stock choose to make the investment. Utkus & Young, *supra,* at 6.

In 2009, the aggregate dollar amount of employer stock held in retirement plans equaled approximately $166 billion. Gary V. Engelhardt, *The Pension Protection Act of 2006 and Diversification of Employer Stock in Defined Contribution Plans* (Ctr. For Ret. Research, CRR WP 2011-20, Nov. 2011), *available at* http://crr.bc.edu/working-papers/the-pension-protection-act-of-2006-and-diversification-of-employer-stock-in-defined-contribution-plans/. In 2010 that total jumped to $240 billion. David Blanchett, *Employer Stock Ownership in 401(k) Plans and Subsequent Company Stock Performance,*

MORNINGSTAR INVESTMENT MANAGEMENT (July 2013), *https://corporate.morningstar.com/us/documents/MethodologyDocuments/ResearchPapers/Employer-Stock-Ownership-in-401k-Plans.pdf* (hereinafter Blanchett).

Workers at large companies are the most likely to maintain a concentrated position in employer securities. For example, employees at Exxon Mobil Corp., McDonald's, and Lowe's Companies had more than 50% of their total 401(k) plan assets invested in their company's stock at the end of 2011. *See* Blanchett, *supra*. Among those employers actively offering employer stock plans, 55% of participants have retirement funds invested in their employer's securities. Utkus & Young, *supra*, at 6. These participants tend to be older employees with longer tenures at their employers' businesses. *Id.*

Participants own employer securities for a number of reasons. Many companies match their employees' salary deferrals with company stock, or allow employees to purchase their stock at a discount price. Blanchett, *supra*, at 6. Company stock plans tend to have higher median contributions by both employers and employees, resulting in higher median account balances in company stock plans than the balances under non-company-stock plans. Utkus & Young, *supra*, at 8. Indeed, the average account balance of a participant in a plan that actively offers company stock is 27% higher than the balance of a participant who is not offered company stock. *Id.*

In addition, it is well-established that the number and character of investment options offered by a plan significantly affects how participants opt to allocate their assets in their participant-directed accounts. Employers play a significant role in motivating their employees to invest in company stock since employers are responsible for selecting the menu of available investment options, including the decision of whether or not to offer employer securities. Plan sponsor design decisions have the strongest and direct correlation to participant holdings in employer stock. One study finds that the mere act of offering employer stock as an option under the plan prompts employees to allocate significant amounts of money to that investment option. Olivia S. Mitchell & Stephen P. Utkus, *Company Stock and Retirement Plan Diversification* 12 (Pension Research Council of the Wharton Sch. Of the Univ. of Penn., PRC WP 2002-4, 2002), *available at* https://institutional.vanguard.com/iam/pdf/CRR_company_stock.pdf.

Researchers have found that investors are biased towards stocks that are "geographically proximate and familiar, which explains the desire for an employee to invest in his employer's stock since it usually is both geographically proximate and familiar (known as the "local bias effect"). Blanchett, *supra*, at 7. They have also found that in plans that include an employer match of company stock, the match represents an implicit endorsement of the company, and participants are more than twice as likely to have concentrated positions in employer stock when a company-stock match is provided (known as the

"endorsement effect"). Blanchett, *supra*, at 6. The odds of having a concentrated portfolio increases further when employers provide participants with other non-matching contributions in employer stock in addition to the match. *Id.* at 2. Indeed, 50% of participants have a concentrated position of greater than 20% when an organization directs any employer contributions to company stock. Utkus & Young, *supra*, at 12. This is striking in comparison to the 15% of participants who have concentrated holdings at companies that make employer contributions in cash. *Id.*

C. Significant Losses In Account Balances Due To Fiduciaries' Failure To Monitor Employer Securities Wreaks Havoc On Employees' Retirement Security.

Obviously, a stock portfolio concentrated in employer securities can pose a significant threat to a participant's retirement security because such portfolios displace investments in diversified equity funds and other balanced funds. *Id.* at 12. Against the backdrop of the various ways that employers, whether intentionally or unintentionally, encourage employees to purchase company-stock, it is significant that employees are inclined to greatly underestimate the risks attendant to concentrating their investments in employer securities and are unduly influenced by past stock performance.

Although Congress attempted to remedy some of these problems by mandating certain

diversification rights in the 2006 Pension Protection Act (PPA), these protections, not surprisingly, have proven largely inadequate. First, no research indicates that the PPA diversification rights, by themselves, have contributed in any material way towards reducing company stock exposure among plan participants due to "the well-documented inertia that characterizes participant investment behavior in DC accounts." Utkus & Young, *supra*, at 3. Second, given just how little the average participant understands as to the need for and methods of planning for retirement, these PPA rights are not valuable to participants. To illustrate, data collected for the National Financial Capability Study revealed that only half of those surveyed understood that, according to generally accepted principles of investment, buying a stock mutual fund provides a safer return than concentrating money in a single company's stock. Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States* 2, 4 (Nat'l Bureau of Econ. Research, NBER Working Paper No. 17108, 2011), *available at* http://www.nber.org/papers/w17108. As another survey reveals, 25% of respondents believe that concentrating their investments in company stock is less risky than a diversified portfolio, with another 39% asserting that the level of risk is equivalent. *See* Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus & Cass R. Sunstein, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 54 (2007) (hereinafter Benartzi, Thaler, Utkus & Sunstein).

As a corollary, individuals also grossly underestimate the amount of money they will need during retirement. In 2004, 45% of households were classified as "at risk," meaning that almost half of American households were "predicted to fall significantly short of having enough money at retirement to maintain their pre-retirement standard of living." Craig R. M. McKenzie, *Misunderstanding Savings Growth: Implications for Retirement Savings Behavior*, JOURNAL OF MARKETING RESEARCH (2011), *available at* http://www.marketingpower.com/aboutama/documents/jmr_forthcoming/misunderstanding_savings_growth.pdf. Misperceptions about the risk of concentrating assets in employer securities, combined with a lack of or minimal amount of investment knowledge and sophistication, can have devastating consequences for participants with concentrated holdings in company-stock.

As this Court has recognized, defined contribution plans (in addition to Social Security benefits) are the primary vehicle for providing retirement income, *LaRue*, 552 U.S. at 255, n.5, and employer-sponsored retirement plans are one of the most significant financial assets for most workers and retirees. Significant declines in the value of employer stock thus can create dire consequences for those workers and retirees who hold employer stock in their retirement plans. Since the likelihood of a company offering an employer-stock plan grows in proportion to the size of that company, a decline in the value of a large company's stock means that a colossal loss in retirement income occurs

simultaneously for a substantial number of employees.

Lessons from our not-so-distant past have certainly demonstrated the pitfalls of concentrated investments in employer stock by plan participants working for large companies. Consider, by way of example, the infamous Enron debacle of the early 2000s. When the value of Enron's stock plummeted from over $80 per share to less than $0.70 per share between 2001 and 2002, 62% of Enron employees' 401(k) assets were invested in Enron stock. Consequently, when the stock fell, employees lost not only their jobs, but also between 70 and 90% of their retirement savings. PATRICK J. PURCELL, CONG. RESEARCH SERV., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans: Investment Risk and Retirement and Retirement Security* 1 (2003), http://congressionalresearch.com/RL31507/document.php?study=Employer+Stock+in+Retirement+Plans+investment+Risk+and+Retirement+Security. About 20,000 participants in Enron retirement plans are estimated to have lost about $1.1 billion in their accounts. Stephanie Armour, *Enron woes reverberate through lives*, USA TODAY (Jan. 27, 2006), *available at* http://usatoday30.usatoday.com/money/industryes/energy/2006-01-25-enron-employees-usat_x.htm?csp=34. Similarly, WorldCom's 401(k) plan held 32% or $642.3 million in employer stock when the stock dropped from $56 to $0.14 per share. David E. Rovella, *MCI, WorldCom's Ebbers Settle 401K Suit for $51 Mln (Update2)* Bloomberg, July 6, 2004, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqypuAjvRgpk. Another

example is found in the Lehman Brothers' bankruptcy, where more than 13,000 employees (half the company's workforce) lost $228.7 million in retirement savings in addition to their jobs immediately after the events that toppled the company. The collapse and subsequent takeover of Bear Stearns decimated millions of dollars in shareholder value over the course of a few days, with the pain particularly felt by the 14,000 employees who owned 30% of the company's stock when it went under. Scott Horsley, *Bear Stearns Collapse Costly to Many*, NPR (Mar. 17, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=88415073.

Particularly when a participant suffers these losses in income at or near retirement age, the long-term effect wreaks havoc, financially and emotionally, on the individual and his or her family, since the participant does not have time to make up for the losses. Countless employees, especially those over age 45, have been compelled to postpone retirement and return to work (frequently at lower pay), or have had to radically adjust their lifestyles after their nest eggs have suddenly vanished. *See, e.g.*, Colette Thayer, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older* at i-iii (2008), *available at* http://www.aarp.org/work/retirement-planning/info-10-2008/retirement_survey_08.html; Armour, *supra*.

While captivating, the headlines detailing the respective falls and subsequent legal battles faced by these corporate giants should not overshadow the

heart rending, personal stories of their former employees. To illustrate, Enron's collapse affected solidly middle class individuals in tragic ways. At Portland General Electric, the Oregon utility once acquired by Enron, older married couples were reported to have lost as much as $800 to $900 thousands in retirement savings. Richard A. Oppel Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. TIMES (Nov. 2001), *available at* http://www.nytimes.com/2001/11/22/business/employees-retirement-plan-is-a-victim-as-enron-tumbles.html. One former Enron employee, Mark Lindquist, a Web designer who lost his job and all his benefits, was reported as struggling to figure out how he can pay for therapy for his autistic son, while Clyde Johnson, a single parent, lost his ability to make timely payments on the home shared with his 11-year old son. Countless others were released on a job market where Enron had won little goodwill. *See* Rick Bragg, *ENRON'S COLLAPSE: WORKERS; Workers Feel Pain of Layoffs And Added Sting of Betrayal*, N.Y. TIMES (Jan. 2002), *available at http://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting-betrayal.html*. Enron provided a mere $4,500 in severance pay, regardless of an employee's tenure, and all health and medical insurance contracts for the 5000 terminated employees were cancelled. *See* Steve Paulson, *Workers lose jobs, health care and savings at Enron*, WSWS (Jan. 2002), https://www.wsws.org/en/articles/2002/01/enro-j14.html. By the time an employee could overcome the *Moench* presumption, the company has collapsed causing real damage to employees' lives.

Yet despite these well-publicized incidents and personal stories, it is still common for employees to have significant portions of their retirement investments concentrated in company stock. *See* Benartzi, Thaler, Utkus & Sunstein, *supra*.

Sadly, the total losses to Enron and WorldCom employees were only fractionally recouped during the lawsuits that ensued following the respective disasters. Receiving what is still the largest settlement to date for ERISA "company stock" litigation, Enron employees sued and recovered only $250 million of the total $1.3 billion lost in the collapse. Meanwhile, the recovery to WorldCom participants was approximately $48.435 million out of the $800 million dollar loss.

As with Enron and WorldCom, by the time an employee can show that a fiduciary's failure to monitor and take action concerning employer stock is imprudent, it is too late. There are few assets from which employees can recover, leaving the employees holding the bag for the fiduciary's imprudent actions. It certainly seems counter-intuitive that a statute designed to protect the retirement security of employees would leave them no better off than the impetus—the failure of Studebaker—for its enactment.

II. THE PARADIGM SHIFT TO DEFINED CONTRIBUTION PLANS RECOGNIZED BY THE COURT NEGATES MUCH OF THE LEGISLATIVE HISTORY UPON WHICH PETITIONER RELIES.

Petitioners and their amici rely upon irrelevant portions of legislative history. Petitioners argue that the Tax Reform Act of 1976 recognized that ESOPs should not be "treat[ed]" like "conventional retirement plans" and warned against rulings that could "block the establishment and success of these plans." (Petitioners' Br. 17-18). They caution that "Congress specifically warned against 'rulings which treat employee stock ownership plans as conventional retirement plans'" in 1976 (Petitioners' Br. 39-40) and argue that this "further supports a robust presumption of prudence" because a "less deferential standard would undermine Congress's policy of encouraging employers to voluntarily offer ESOPs" and "dissuad[e] employers from offering these plans." (Petitioners' Br. 17-18, 37-38). While potential liability might be a consideration for plan sponsors, it would have to be weighed against the multiple benefits of employee stock ownership touted by Petitioners and their amici.[4] The

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[4] This disincentive assertion is questionable given the other benefits implicit within the offering of an employer stock fund including, for example, "an affordable means of raising capital" that generally leads to "increases in productivity, sales, and hiring[;]" makes employees feel "more satisfied[;]" and the provision of "significant tax advantages. Amicus Br. of Chamber of Commerce 5-13. As Petitioners recognize, Senator Long stated into the congressional record in 1983 that "companies with employee ownership are likely to be more productive and

little other legislative history relied upon by Petitioners[5] adds little, if anything, to the analysis. For example, the 1990 statement is a historical recap of why ESOPs were allowed by ERISA.

Petitioners and their amici, to the extent they rely upon legislative history, ignore the lack of flow in their argument. As AARP emphasizes at the outset of this brief, in 2008, this Court recognized that the "landscape of employee benefit plans . . . has changed" and that "[d]efined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, and when [*Massachusetts Mut. Life Ins. Co. v.] Russell*, [473 U.S. 134 (1985)] was decided [in 1985], the defined benefit plan was the norm of American pension

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more profitable than those without, and the more ownership held by employees, the better the performance of the company." (Petitioners' Br. 38 n. 15.) That companies would be dissuaded from accepting these benefits without a robust presumption of prudence is a baseless statement.

[5] The remainder of legislative history relied upon by Petitioners' includes the Senate Special Committee on Aging, Developments in Aging: 1989, S. Rep. No. 101-249, at 94 (1990), for the proposition that "Employee stock ownership plans were promoted as a means for transferring the ownership of a company's capital to its workers" and Staff of S. Committee on Finance, Employee Stock Ownership Plans, 96th Cong., 2d Sess. 27 (Comm. Print 1980), noting "Congressional intent that an ESOP is not primarily a retirement plan, but rather has as its primary objective the providing of stock ownership interests for employees." (Petitioners Br. 27).

practice."[6] Reliance on legislative history from the prior landscape, when ESOPs were not "retirement plans" in the sense that they are today does not make sense. To say that an ESOP fund in a plan such as is here before the Court—the purposes of which Plan are "to provide retirement and other benefits for Participants and their respective beneficiaries." J.A. 284—should not be treated as a retirement plan is to ignore the shift towards defined contribution retirement plans recognized by *LaRue* as the current standard. Indeed, the legislative history relied upon by Petitioners largely predates the existence of 401(k) defined contribution plans altogether.[7] Section 401(k) plans were first established in 1978 by Section 135(a) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2785 (Nov. 6, 1978). They did not exist when the legislative history Petitioners' most emphasize was made. Thus no legislative history from the Tax Reform Act of 1976 can logically support Petitioner's position.

Simply stated, legislative history which predates both the enactment of 401(k) plan statutory provisions and the sea change towards the predominance of such plans sheds no light on how ESOPs in the current era should be regarded.

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[6] *LaRue*, 552 U.S. at 254-55 (citations and internal quotation marks omitted).

[7] Subsequent legislative history is generally limited to tax benefits for certain ESOP transactions. *E.g.*, Amicus Br. of ESOP Ass'n 22-23. It does not follow from the allowance of certain tax deductions that a presumption of prudence should be read into ERISA.

III. THIS COURT SHOULD NOT INSULATE ESOP FIDUCIARIES FROM MEANINGFUL JUDICIAL REVIEW BY IMPOSING AN INSURMOUNTABLE PLEADING REQUIREMENT ON INJURED PARTICIPANTS IN COMPANY-STOCK PLANS.

For all of the compelling reasons advanced by Respondents, this Court should not adopt the "presumption of prudence" set forth in *Moench v. Robertson* by the Third Circuit. But if this Court were inclined to endorse *Moench*, then the Court should read *Moench only* as establishing an evidentiary presumption in favor of ESOP fiduciaries rather than imposing a heightened pleading requirement on injured plan participants. 62 F.3d 553 (3d Cir. 1995). *Moench* considered whether an ESOP fiduciary abused its discretion by investing plan assets solely in company stock as the company deteriorated into bankruptcy, "rendering the employee's ESOP accounts virtually worthless."[8] The

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[8] *Moench v. Robertson*, 62 F.3d 553, 559 (3d Cir. 1995). *Moench* involved an ESOP that was a stand-alone fund designed to provide employees with the opportunity to invest in employer stock, not an ESOP which was part of 401(k) retirement plan as is the case here. *Id.* at 557. The plan documents directed the plan's fiduciaries to invest the assets primarily in employer securities, but granted those fiduciaries some leeway "to invest in other vehicles," including "short-term money market instruments." *Id.* at 559. The district court had ruled that ESOP plan documents absolved the fiduciaries from any liability that could potentially attach to their decision to remain invested in employer securities. *Id.* at 650. On appeal, the Third Circuit rejected the defendants' argument that ESOP fiduciaries are

Moench court announced that a rebuttable presumption of prudence applies to shelter an ESOP fiduciary's investment decisions from strict judicial scrutiny. *Id.* at 570. An ESOP fiduciary is presumed to comply with ERISA's duty of prudence when it decides to invest plan assets in employer securities. *Id.* To rebut the presumption, a plaintiff must introduce evidence to "show that the ERISA fiduciary could not have reasonably believed that the plan's drafters would have intended under the circumstances that he continue to comply with the ESOP's direction that he invest exclusively in employer securities." *Id.* at 571.

The premise of the *Moench* presumption is the notion that the dual nature of an ESOP as both a retirement plan and a "technique of corporate finance" to encourage employee ownership creates an inherent tension for plan fiduciaries. *Moench*, 62 F.3d at 569. ESOP fiduciaries must wear "two hats" as they balance their sometimes competing obligations to administer the ESOP in compliance with "the provisions of both a specific employee benefits plan and ERISA." *Id.* at 569; *White v. Marshall*, 714 F.3d 980, 988 (7th Cir. 2013) ("ERISA's simultaneous demands to comply with plan documents and to exercise prudence in choosing investment options for plan participants can place fiduciaries on a razor's edge."). In recognition of this careful balancing act, the *Moench* court found it best to attach a certain

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immune from liability if diversification of investments is prohibited by the plans they administer. *Id.* at 571. The Third Circuit reasoned this was not what Congress intended. *Id.*

degree of deference to the investment decisions of ESOP plan fiduciaries.

The *Moench* presumption does not confer blanket immunity from liability for ESOP fiduciaries, even where the plans they administer prohibit diversification, because ERISA only exempts ESOP fiduciaries from "certain per se violations" of the duty of prudence. *Moench*, 62 F.3d at 569-71. An ESOP fiduciary is exempt from ERISA's prudence standard only insofar as it relates to the duty to diversify. ESOP fiduciaries are still obligated to act in accordance with their duties of prudence and loyalty when they decide how and when to invest, regardless of the exception from strict liability for failure to diversify. *See, e.g., Eaves v. Penn*, 587 F.2d 453, 459 (10th Cir. 1978) ("[I]n making an investment decision of whether or not a plan's assets should be invested in employers securities, an ESOP fiduciary, just as fiduciaries of other plans, is governed by the 'solely in the interest' and 'prudence' tests of [ERISA §404]."); *see also Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 955-56 (D.C.Cir.1985) ("The investment decisions of a profit sharing plan's fiduciary are subject to the closest scrutiny under the prudent person rule, in spite of the strong policy and preference in favor of investment in employer stock."). Quite simply, section 404(a)(2) is not an exception when investing in qualified employer stock may be imprudent for reasons other than non-diversification; in those situations, ERISA's "care, skill, prudence, and diligence" requirement remains fully applicable.

Importantly, the *Moench* plan was a true ESOP with no investment options other than company stock available to the participants. On the other hand, the Fifth Third Plan consists of an employer stock fund (ESOP) that is but one of numerous investment vehicles offered as constituents of a larger Plan,[9] and the Plan language explicitly declares that "[T]he purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries."[10] Therefore whatever value the Court sees fit to attach to the *Moench* approach in the overall ERISA scheme, it should be evident that it is not applicable in a case such as this. Rather, insofar as the statutory language compels that the fiduciary conduct itself as a prudent man dealing with an enterprise of like character and like aims, and the Plan's stated character and aim is to promote retirement savings, ERISA's text requires that a court consider the conduct "under the circumstances then prevailing." Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Viewed in that light, once Company stock became an overly risky retirement investment for the Plan participants because of, inter alia, the vastly changed circumstances from when the

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[9] J.A. 123-33, 140-43.

[10] J.A. 284 (Plan Document, Article 1, § 1.2; J.A. 146 (August 8, 2007 Summary Plan Description) and J.A. 222 (October 1, 2008 Summary Plan Description) (both stating "The Plan is for your retirement.")

settlors adopted the Plan,[11] a prudent fiduciary tasked with the responsibility of prudently managing retirement assets would not have stood idly by and watched as tens of millions of dollars' worth of Plan assets vanished which, as clearly alleged in Respondent's Complaint, was occurring. After all, "[a] trustee who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent." *Armstrong v. LaSalle Bank Nat'l Assoc.*, 446 F.3d 728, 734 (7th Cir. 2006).

To the extent that this Court is inclined to endorse *Moench* at all, even in the face of convincing reasons not to adopt it, this Court must find that the *Moench* presumption is an evidentiary standard that controls a plaintiff's ultimate burden of proof at trial in an action against ESOP plan fiduciaries. The procedural postures of *Moench* and *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995), the first case to apply the *Moench* presumption, indicate that the presumption of prudence is not an additional pleading requirement. *Moench* conducted a *de novo* review of the evidentiary record established in the trial court, then vacated the grant of summary judgment in favor of the fiduciary defendants and remanded the case for "further proceedings in which the record may be developed and the case may be judged on the basis of the principles set forth" in the Third Circuit's opinion. 62 F.3d at 572. In the context of a similar procedural posture, the Sixth Circuit in *Kuper* affirmed an entry of summary judgment in

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[11] J.A. 55-57 (allegations of the Complaint that detail how Fifth Third no longer utilizes conservative lending practices as it historically did).

favor of the plan's fiduciaries, agreeing that the failure "to diversify or liquidate the ESOP funds during the pendency of [a] trust-to-trust transfer" did not rise to the level of breach of fiduciary duty. 66 F.3d. at 1450. The *Kuper* court grounded its holding on "the stipulated record of the case," which included "the parties' trial briefs, proposed findings of fact and conclusions of law." *Id.* at 1452.

Both *Moench* and *Kuper* accordingly applied the presumption of prudence to a fully developed evidentiary record, and not merely the pleadings. The implication is that the presumption was not intended to serve as a supplementary pleading requirement to test the sufficiency of a participant's complaint upon a motion to dismiss. *See also Pfiel v. State Street Bank & Trust Co.*, 671 F.3d 585, 592 (6th Cir. 2012) (holding that *Moench* did not create an additional pleading requirement based on "the plain language of *Kuper* itself [explaining] that an ESOP plaintiff could 'rebut this presumption of reasonableness by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision'").

Applying *Moench* upon a motion to dismiss will result in premature dismissal of plaintiffs' complaints because "whether the defendants breached their fiduciary obligations require[s] the development of the fact[ual record]." *Rankin v. Rots*, 278 F.Supp. 2d 853, 879 (E.D. Mich. 2003) (refusing to apply ESOP presumption on a motion to dismiss). Plaintiffs should not be required to make out a prima facie case of fiduciary breach at the pleading stage

because, as the First Circuit articulated in *Lalonde v. Textron, Inc.*, "further record development—and particularly input from those with expertise in the arcane area of the law where ERISA's ESOP provisions intersect with its fiduciary duty requirements—[is] essential to a reasoned elaboration of that which constitutes a breach of fiduciary duty in this context." 369 F.3d 1, 5 (1st Cir. 2004); *accord Quan v. Computer Sci. Corp.*, 623 F.3d 870 (9th Cir. 2009) (construing the plaintiff's burden as an evidentiary standard).

Other Circuit Courts to consider the issue agree that the *Moench* presumption is an evidentiary standard. For example, the Fifth Circuit in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), weighed the allegations of imprudence against the backdrop of the facts introduced in the lower court in opposition to the fiduciary's motion for summary judgment. *Id.* at 254-56 (noting that application of *Moench* does not turn on "pleading artifices")[12]. Similarly, in *Steinman v. Hicks*, the Seventh Circuit held that a trust-to-trust transfer of plan assets to an acquiring corporation was not imprudent because the Plaintiffs failed to "introduce evidence of the overall risk created by the retirement package that they acquired when they became employees of [the new company]." 352 F.3d 1101, 1106 (7th Cir. 2003). *Steinman* concluded that circumstances attendant to the acquisition, the plan's short investment horizon and the relative risk profiles of fixed-income securities versus stock did

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[12] *But see Kopp v. Klein*, 722 F.3d 327, 399 (5th Cir. 2013).

not "demonstrate imprudence in the management of an ESOP, at least on the basis of the record compiled in the district court." *Id.* at 1103-05.

A decision to apply the *Moench* presumption at the motion to dismiss stage will effectively insulate ESOP fiduciaries from any liability for their investment decisions, a result that Congress could not have anticipated. Congress did not intend to exempt plan fiduciaries wholesale from judicial review by imposing a potentially insurmountable pleading burden on ERISA plaintiffs. "ESOP fiduciaries must act in accordance with [ERISA's] duties of loyalty and care" and are therefore covered by "ERISA's stringent requirements" except to the extent of the "few select provisions" specially carved out by Congress. *Moench*, 62 F.3d at 569. ERISA §406 and §407 specifically release ESOP fiduciaries from "certain per se violations" of the duty of prudence, while the *Moench* presumption provides them with a shield against strict judicial scrutiny. *Id.* at 570. ESOP fiduciaries are thus already afforded special protections against liability for their actions and inactions. It is not the province of courts to engraft an essentially absolute judge-made protection on ERISA's "comprehensive and reticulated" statutory scheme. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

The Court should not place the retirement assets of millions of private employees at risk by insulating fiduciaries' investment decisions from meaningful judicial review. The danger of adopting *Moench* as a pleading standard is especially apparent

given that the legacy of the Third Circuit's decision is still evolving in the lower courts. As recently as 2007, *Edgar v. Avaya, Inc.*, 503 F.3d 340 (3d Cir. 2007), extended the *Moench* presumption to all eligible individual account plans (EIAPs). Other courts have since followed suit. *See In re RadioShack Corp. "ERISA" Litig.*, 547 F. Supp. 2d 606, 613 (N.D. Tex. 2008) (finding that the *Moench* presumption extends to all EIAPs).

A finding that *Moench* applies at the motion to dismiss stage will deprive countless injured ESOP participants of his or her day in court, while safeguarding the unscrupulous practices of breaching fiduciaries. Participants will almost always be unable to produce satisfactory evidence of breach absent formal discovery, as the fiduciaries are always in possession of the evidence necessary to prove their breach of duty[13]. Without the benefit of discovery,

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[13] The Eight Circuit in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) stated:

Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties-duties which have been described as "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982). In giving effect to this intent, we must be cognizant of the practical context of ERISA litigation. No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the

plaintiffs will fail to satisfy their evidentiary burden at the earliest stage of litigation, which will result in dismissal since a court's inquiry in deciding a motion to dismiss is generally constrained to the facts and documents incorporated in the complaint.

If a court does decide to accept evidence outside the pleadings, it must convert the defendant's motion to one for summary judgment and then "afford the plaintiff an opportunity to submit additional evidentiary material of his or her own." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). However, the possibility of converting the motion to one for summary judgment does not rectify the problem because it is within the discretion of the trial court to decide whether or not "to allow parties to conduct discovery before entering summary judgment." *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993).

Furthermore, it is dangerous to employ the presumption as a pleading requirement because *Moench* did not provide anything more than a vaguely worded outline of the applicable rebuttal standard. *Moench* states only that plaintiffs are required to "introduce evidence" tending to show that the ESOP fiduciary could not reasonably have

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remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.

believed that remaining invested in employer securities "was in keeping with the settlor's expectations of how a prudent trustee would operate." 62 F.3d at 571.

The lack of adequate guidance will undoubtedly deter plaintiffs from filing suit because they will never be sure how much and what kind of evidence they must produce in order to survive a motion to dismiss. Fiduciaries will meanwhile take solace in the lack of objective criteria. Knowing that most complaints will be dismissed, fiduciaries will not be motivated to adhere to the highest standards of loyalty and prudence by seeking independent investment advice or by investigating alternatives before engaging in a particular course of investment.

Moreover, requiring litigants to affirmatively plead enough facts to overcome the *Moench* presumption upon a motion to dismiss also strays from the notice pleading standard announced by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Rule 8(a) of the Federal Rules of Civil Procedure is a liberal pleading standard that "allows broad access to discovery and relies on a motion for summary judgment to eliminate claims lacking merit." *In re Elec. Data Sys. Corp. ERISA Litig.*, 305 F. Supp. 2d 658, 669 (E.D. Tex. 2004). A complaint need not contain "detailed factual allegations" to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must merely contain sufficient factual matter, taken as true, "to state a claim for relief that is plausible on its face."

Id. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful conduct]." *Bell Atl. Corp.*, 550 U.S. at 545. It is therefore inappropriate "under a notice pleading system...to require a plaintiff to plead enough facts to establish a prime facie case" of fiduciary breach. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002). In this case, to pass muster under the notice pleading system, the complaint must simply state that the defendants acted in their fiduciary capacity when they decided to continue the investment in employer stock and allege that they breached their fiduciary duties by virtue of that decision given that attendant circumstances so-alleged favored divestment and diversification. *See Vivien v. WorldCom, Inc.*, 2002 WL 31640557, at *5 (N.D. Cal. July 26, 2002).

Consistent with *Bell Atl. Corp.*, these allegations of breach adequately place the "defendants on notice of plaintiffs' theories of a failure to investigate and evaluate an investment, to invest prudently and to act in the sole interest of plan participants." *Id.* A decision to require ESOP participants to plead facts rebutting the *Moench* presumption at the pleading stage clearly conflicts with this Court's interpretation of Rule 8(a) as demanding "a short and plain statement of the claim" that only needs to "give the defendant fair notice of

what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512.

Courts generally refuse to consider evidentiary presumptions at the pleading stage, and for good reason. In *Swierkiewicz*, this Court determined that Plaintiffs are not required to plead a prima facie case under the evidentiary framework established for Title VII cases. 534 U.S. at 510-11. The *Moench* presumption is also an "evidentiary standard" because it controls the Plaintiffs' ultimate burden of proof." *In re Elec. Data Sys. Corp. ERISA Litig.*, 305 F. Supp. 2d at 668 (applying *Swierkiewicz*); *cf. Stein v. Smith*, 270 F. Supp. 2d 157, 172 (D. Mass. 2003) (describing the ESOP presumption as an evidentiary matter). As this Court illustrated in *Swierkiewicz*, the problem of applying an evidentiary standard at the motion to dismiss stage is "that revelations in discovery [may] render the [standard] inapplicable." *In re Elec. Data Sys. Corp. ERISA Litig.*, 305 F. Supp. 2d at 172. For example, discovery may reveal that *Moench* does not apply because the plan does not qualify as an ESOP, or because the defendants were not acting in their fiduciary capacities when they engaged in the supposedly imprudent course of conduct. Courts should be reluctant to decide these facts prematurely in the absence of formal discovery. Given the importance Congress placed on the societal good of protecting the retirement savings of American workers, these determinations should not be made until discovery develops a factual record that allows the court to judge the credibility of the witness testimony and exhibits presented by the parties.

CONCLUSION

Respondents adequately pled breaches of the duties of prudent and loyal management. Based on the plain language of the statute, Petitioners are not entitled to any presumption of reasonableness as to whether their actions were prudent (outside of diversification). However, should the Court decide that a presumption is appropriate, such presumption only should be applied as an evidentiary presumption.

For the foregoing reasons, the court should affirm the decision of the Court of Appeals.

Respectfully Submitted,

JAY E. SUSHELSKY*
AARP FOUNDATION
LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record* for
Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
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IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,
v.
JOHN DUDENHOEFFER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
(Counsel of Record)
AMANDA M. JARET
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337
jcoppess@aflcio.org

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MISCELLANEOUS:

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of 12.5 million working men and women.[1] The collective bargaining agreements negotiated by the AFL-CIO's affiliates typically provide covered employees with pension benefits. Many of these negotiated pension plans are covered by the Employee Retirement Income Security Act ("ERISA"), and, as that statute requires, provide for the management of plan assets by named fiduciaries. The instant case concerns the statutory duty of such named fiduciaries to prudently manage pension plan assets for the sole purpose of providing retirement income to the covered employees and their beneficiaries. The proper definition of that statutory duty is crucial to protecting the legitimate expectations of employees in receiving retirement income from their pension plans.

STATEMENT

Petitioner Fifth Third Bancorp ("Company") sponsors the Fifth Third Bancorp Master Profit Sharing

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[1] Counsel for the Petitioners and counsel for the Respondents have filed letters consenting to the filing of all *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Plan ("Plan"), which is an "employee pension plan" taking the form of a "defined contribution" or "individual account" plan under ERISA. Pet. 4. *See* 29 U.S.C. §§ 1002(2)(A),1002(3), & 1002(34). The Plan offered Company employees, as plan participants, a choice of pension fund options. Pet. App. 4. One option was an employee stock ownership plan ("ESOP") called the Fifth Third Stock Fund. Pet. 4. The Plan provided that the Fifth Third Stock Fund was to be invested primarily in shares of Company stock. Pet. App. 4. Fifth Third matched a portion of participants' pre-tax contributions to one or more of the pension fund options through contributions to the Fifth Third Stock Fund. J.A. 574-75; Pet. App. 4. As required by ERISA, the Plan allowed participants to move both their own and the Company's matching contributions from the Fifth Third Stock Fund to one of the other fund options provided by the Plan. J.A. 141, 576-77.

Fifth Third is a bank holding company. In early 2007, the Company's financial condition severely worsened as a result of rising defaults on risky subprime mortgages. J.A. 76.[2] Initially, the Company's financial distress was concealed by overly optimistic public reports. J.A. 59, 67-69 & 76-77. However, in June 2008, the Company's distressed financial conditions became public, causing an immediate drop of 27% in value of the Company's common stock. J.A. 81-82. Over the ensuing year, the value of the Company's common stock dropped by almost 75%. Pet. App. 5. As a result, plan participants who had their retirement

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[2] This statement of facts is based on the allegations in the Amended Complaint.

savings in the Fifth Third Stock Fund lost tens of millions of dollars. *Ibid.*

Because of their control over the management of Fifth Third, the Petitioners were in a position to know of the Company's financial distress before that information was disclosed to the public. Nevertheless, the Petitioners, in their capacity as plan fiduciaries, continued to invest plan assets in Company stock both before the public disclosure caused a precipitous decline in the value of that stock and after. In fact, neither the onset of the Company's financial crisis nor the steep drop in the price of its common stock altered the Petitioners' pattern of investing plan assets in Company stock.

The Respondents, who are plan participants, filed suit alleging that the Petitioners had breached their duty as fiduciaries under ERISA by failing to reevaluate whether the Company stock had become an imprudently risky investment for the assets of a pension plan. The District Court dismissed the Respondents' complaint on the grounds that the investment of ESOP assets in employer stock was prudent as a matter of law. Pet. App. 37-38. The Court of Appeals reversed that ruling and remanded the case for further proceedings. Pet. App. 3.

SUMMARY OF ARGUMENT

ERISA generally requires that the assets of covered pension plans be under the control of named fiduciaries. These fiduciaries are required to manage pension plan assets for the exclusive purpose of providing retirement or other forms of deferred income to the plan participants and their beneficiaries. In managing plan assets, the fiduciaries are required to exercise the

level of care, skill, prudence, and diligence that a prudent person would exercise in managing assets for a similar purpose.

The question presented by this case is whether fiduciaries of a pension plan that takes the form of an ESOP are entitled to a special presumption of prudence with respect to investment of plan assets in the common stock of the settlor-employer. The Respondents allege that the Petitioners behaved imprudently by continuing to invest pension plan assets in Company stock after circumstances revealed that the stock had become an unacceptably risky investment.

The Petitioners do not deny that they continued to invest plan assets in Company stock after that stock had become a risky investment. Rather, they argue that "an ESOP fiduciary's decision to invest in employer securities is prudent as a matter of law, unless extraordinary circumstances exist that substantially impair the plan's purpose of furthering employee ownership." Pet. Br. 46. The Petitioners argue that "an ESOP fiduciary's decision to continue investing in employer securities is not imprudent absent extraordinary circumstances such as the impending collapse of the company," because only then would "the plan's core goal of employees holding an ownership interest in their employer . . . be jeopardized." *Id.* at 23 & 24 (quotation marks omitted).

ERISA directly addresses the question of whether ESOP fiduciaries have the same general duty of prudence as other pension plan fiduciaries. The statute provides that ESOP fiduciaries are under the same duty of prudence as other pension plan fiduciaries,

with the sole exception that ESOP fiduciaries are exempt from the statutory duty to diversify plan assets.

ERISA also directly addresses and refutes the Petitioners' argument that ESOP fiduciaries should single-mindedly pursue the "goal of employees holding an ownership interest in their employer." Pet. Br. 24. ERISA states that pension plan fiduciaries are required to act for the sole purpose of providing retirement and other similar forms of deferred income to plan participants and their beneficiaries. To the extent that plan documents direct ESOP fiduciaries to follow a course of action that would imprudently place at risk the plan's ability to deliver expected retirement income, ERISA provides that the fiduciaries must disregard the plan documents.

There is no question that the fiduciaries of a pension plan holding the common stock of a company whose sudden financial troubles cause the price of the stock to precipitously drop have a duty to carefully consider whether it is prudent for the plan to continue to hold that stock, much less continue to buy more of it. The Petitioners have never explained why they continued to invest plan assets in Company stock after the Company's financial distress caused the stock to drop steeply in value. The Petitioners' brief has suggested possible reasons for their action, but the suggested reasons seem dubious on their face and there is no evidence that the Petitioners themselves acted for those reasons. The amended complaint's allegations of imprudent investment of plan assets are sufficient to require the Petitioners to explain the basis for their action and to allow the Respondents to test the prudence of the Petitioners' action.

ARGUMENT

I. THE ROLE OF PLAN FIDUCIARIES HAVING AUTHORITY TO MANAGE PENSION PLAN ASSETS IN ACCORDANCE WITH A STRINGENT DUTY OF LOYALTY AND PRUDENCE IS ESSENTIAL TO PROTECTING THE INTERESTS OF PLAN PARTICIPANTS AND THEIR BENEFICARIES.

The role of the plan fiduciary in managing plan assets is crucial to ERISA's scheme for protecting employees' interest in receiving expected employment benefits. 29 U.S.C. § 1001(b). ERISA contemplates that each employee benefit plan will be administered by one or more fiduciaries having sufficient authority to effectively manage plan assets. *Id.* § 1102(a)(1). ERISA subjects the fiduciaries' exercise of that authority to stringent duties of loyalty and prudence. *Id.* § 1104(a)(1).

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," which "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). "[A]ll assets of an employee benefit plan [must] be held in trust by one or more trustees," who "shall have exclusive authority and discretion to manage and control the assets of the plan." *Id.* § 1103(a). The trustees have authority to "appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." *Id.* § 1102(c)(3). *See also id.* § 1103(a)(2).

In managing plan assets, an ERISA fiduciary is subject to a stringent duty of loyalty to the plan partici-

pants and their beneficiaries. "[T]he assets of a plan . . . [are] held for the *exclusive* purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1) (emphasis added). Accordingly, "a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1) (emphasis added). In particular, the fiduciary is required to discharge his duties "for the *exclusive* purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." *Id.* § 1104(a)(1)(A) (emphasis added; punctuation omitted). With respect to a "pension plan," including defined contribution and individual account plans, the "benefits" in question are "retirement income" or other "deferral of income." *Id.* § 1102(2)(A).

A plan fiduciary must exercise prudent judgment in single-mindedly pursuing the interests of plan participants and their beneficiaries. ERISA requires that a fiduciary exercise his authority "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

"The duty of an ERISA trustee to behave prudently in managing the trust's assets . . . is fundamental." *Armstrong v. LaSalle Bank Nat'l Assoc.*, 446 F.3d 728, 732 (7th Cir. 2006). ERISA mandates the appointment of trustees with authority to manage plan assets, and it imposes exacting obligations on those trustees with

regard to plan administration. These requirements are intended to ensure that the plan is operated by knowledgeable, prudent individuals who are responsible for acting solely in the interests of the participants and their beneficiaries.

The rule advocated by the Petitioners – that "an ESOP fiduciary's decision to invest in employer securities is prudent as a matter of law," Pet. Br. 46 – would effectively relieve ESOP fiduciaries of any duty of prudence with regard to the management of ESOP plan assets. Doing so, would seriously undermine the protections accorded ESOP pension plan participants by ERISA.

II. THE FIDUCIARIES OF PENSION PLANS TAKING THE FORM OF AN EMPLOYEE STOCK OWNERSHIP PLAN HAVE THE SAME DUTY OF PRUDENCE IN MANAGING PLAN ASSETS AS THE FIDUCIARIES OF OTHER PENSION PLANS.

The Petitioners maintain that "an ESOP fiduciary's decision to invest in employer securities – that is, to do exactly what the terms of the plan require – [is entitled to] a presumption of prudence . . . unless extraordinary circumstances, such as a serious threat to the employer's viability, mean that continued investment would substantially impair the purpose of the plan." Pet. Br. 16. This assertion rests on the Petitioners' mistaken assumption that an ESOP's principal purpose is "to allow employees to build a long-term ownership stake in their employer." *Ibid.* *See also id.* at 24 ("the plan's core goal of employees holding an ownership interest in their employer"). From their erroneous premise that "the fundamental

purpose of an ESOP is to build employees' equity interest in their employer," the Petitioners draw the conclusion that the fiduciary must "adhere[] to the trust's investment instructions" unless "there is a serious threat to the company's ongoing viability [such that] continued investment in its securities may no longer advance the plan's primary purpose, because a collapse would leave employees with no meaningful ownership interest in their employer." *Id.* at 17.

In short, it is the Petitioners' position that an ESOP fiduciary must manage plan assets with the single-minded purpose of fostering employee ownership and may deviate from that purpose only where the employer is in such dire financial circumstances that it appears likely there will be no business left for the employees to own. That position betrays a fundamental misunderstanding of the statutory duty of an ESOP fiduciary under ERISA.

It is true that a fiduciary has a general obligation to exercise his authority "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). And, all things being equal, that obligation would require an ESOP fiduciary to follow plan directions to invest plan assets in employer stock. But "trust documents cannot excuse trustees from their duties under ERISA." *Cent. States Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 568 (1985). "[A]ny provision in an . . . instrument which purports to relieve a fiduciary from responsibility . . . or duty under [ERISA] [is] void." 29 U.S.C. § 1110(a). Thus, a fiduciary may follow investment directions contained in plan documents *only* "insofar as such documents and instruments are consistent with the provisions of

[ERISA]," *id.* § 1104(a)(1)(D), and "[a]n imprudent direction cannot be a proper direction since the trustee has an express statutory duty of prudence," *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 406 (7th Cir. 2006).

The fact that ESOP fiduciaries are exempt from the general requirement to "diversify[] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. § 1104(a)(1)(C), does not relieve them of the duty to exercise prudence in all other respects. ERISA directly addresses this issue by providing that the general "prudence requirement" is relaxed with respect to ESOP purchases of employer stock "*only* to the extent that it requires diversification." *Id.* § 1104(a)(2) (emphasis added). Thus, "even though, by the very nature of an ESOP, the trustee does not have a *general* duty to diversify . . . the absence of any general such duty from the ESOP setting does not eliminate the trustee's duty of prudence." *Armstrong*, 446 F.3d at 732 (emphasis in original).

ERISA requires a fiduciary to "discharge his duties with respect to a plan . . . for the *exclusive* purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added). And with respect to "pension plans," including ESOPs and other kinds of defined contribution plans, the relevant "benefits" are "retirement income" or other "deferral of income." 29 U.S.C. § 1002(2)(A). The fiduciary cannot allow the employer-settlor's "purpose . . . to allow employees to build a long term ownership stake in their employer," Pet. Br. 16, to override the fiduciary's statutory duty to manage the plan pru-

dently for the purpose of delivering deferred income to the participants and their beneficiaries. The fiduciary's duty to manage the plan in a manner that is "consistent with the provisions of [ERISA]," 29 U.S.C. § 1104(a)(1)(D), entails an obligation to remain continuously vigilant regarding whether it is prudent to continue investing plan assets in accordance with the directions contained in the plan documents.[3]

Precisely because "a stock can be imprudently risky for an employee savings plan even in the absence of . . . imminent collapse," *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 892 (E.D. Mich. 2008), an ESOP fiduciary must do more than satisfy himself that the employer will ultimately survive a business crisis before continuing to invest plan assets in employer stock. Rather, the fiduciary must exercise "a degree of caution that is reasonably appropriate or suitable to . . . the beneficiaries' interests." *Restatement (Third) of Trusts* § 77, cmt. b (2007). Doing so requires the fiduciary to carefully attend to "the needs, independent resources, and other personal financial circumstances and concerns or goals of the various beneficiaries," most particularly, "the risk tolerance . . . of the trust and its beneficiaries." *Id.*, cmt. b(1).

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[3] ERISA's direction that the fiduciary "discharge his duties with respect to a plan . . . for the exclusive purpose of providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A)(i), overrides any provision of the plan. *See Restatement (Third) of Trusts* § 72, p. 18 (2007). Thus, the extended discussion in the Petitioners' brief (pp. 31-34) regarding "the trust law . . . establishing a standard for departing from th[e] terms [of a trust]," *id.* at 31, is completely irrelevant.

The fiduciary of an ESOP pension plan must manage plan assets with the sole aim of protecting the interests of plan participants and their beneficiaries in receiving deferred income. An ESOP fiduciary cannot allow any secondary plan purpose of fostering employee ownership to interfere with his duty to protect those interests. Accordingly, an ESOP fiduciary is entitled to no presumption that continued investment of plan assets in employer stock is prudent per se.

III. TO DETERMINE WHETHER A PENSION PLAN FIDUCIARY ACTED PRUDENTLY IN CONTINUING TO INVEST PLAN ASSETS IN EMPLOYER STOCK IN THE FACE OF CHANGED CIRCUMSTANCES, IT IS NECESSARY TO KNOW THE ACTUAL BASIS FOR THE FIDUCIARY'S DECISION AND TO TEST THAT BASIS FOR PRUDENCE IN THE CIRCUMSTANCES AT THE TIME OF THE FIDUCIARY'S DECISION.

Like other employee benefit plan fiduciaries, the fiduciary of an ESOP pension plan must "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). In other words, the ESOP fiduciary must exercise the same sort of care, skill, prudence, and diligence that a prudent person charged with the duty of protecting the pension interests of the plan participants and beneficiaries would exercise in similar circumstances. ESOP fiduciaries are not charged with guaranteeing the success of plan investments.

Nor does the duty of prudence dictate a single course of conduct in any given set of circumstances.[4]

The relevant circumstances in this case are that, during the course of 2008 it became increasingly clear to the management of Fifth Third Bancorp – and hence to the Petitioners who were both plan fiduciaries and part of the Company's management – that the Company was facing rapidly deteriorating financial conditions as a result of losses on risky mortgage loans. Once these conditions were made public, it became clear to the market that Fifth Third common stock was a very risky investment and the value of the stock began a steep slide. Throughout the entire period leading up to the public disclosure of the Company's financial distress and thereafter throughout the period of decline in the value of the Company's stock, the Petitioners continued to invest plan assets in Fifth Third common stock, just as they had during periods when the Company's stock was a much less risky investment. The question presented by this case is whether in so doing the Petitioners were exercising the same "care, skill, prudence, and diligence" that a "prudent man" would have exercised in those circumstances.

To begin with, it clearly would not have been prudent for the plan fiduciaries to simply ignore the Company's changed financial condition and the increased risk of investing in its stock. "When the exercise of a

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[4] In this regard, it bears emphasis that "judicial intervention on the ground of abuse is called for, not because the court would have exercised the discretion differently, but because the trustee's decision is one that would not be accepted as reasonable by persons of prudence." *Restatement* § 87, cmt. c, p. 245.

discretionary power is left to the judgment of a trustee, an abuse of discretion may result . . . if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion." *Restatement* § 87, cmt. c, at 244. Thus, "[a] trustee who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent." *Armstrong*, 446 F.3d at 734.

It would have been equally imprudent for the Petitioners to have acted on the assumption – advanced in their brief – that they were powerless to deviate from the Plan's instructions regarding the investment in Company stock unless the Company was on the verge of collapse. As we demonstrated in the prior section, that assumption is legally erroneous. And, a fiduciary who acts on "a misunderstanding of applicable fiduciary law" does not exercise the required prudence. *Restatement* § 87, cmt. c, p. 244. *See also id.* § 76(2)(a) & cmt. c, at 68 & 70.

Rather, the Petitioners were required to carefully consider whether the steep drop in the price of the Company stock in reaction to the disclosures concerning its financial difficulties indicated that the stock was no longer a prudent investment for a pension plan. "[T]he fall in the market price of [Company stock] was increasing the risk borne by owners of the stock," because "the higher the ratio of fixed-interests debt to equity is, the riskier is the position of the equity holders (the common stockholders)." *Summers*, 453 F.3d at 408-09. While pension plan fiduciaries might be entitled to treat the market price of common stock as "the best estimate of the value of the stocks," *id.* at 408, they cannot simply assume that purchase

of common stock at the market price is always a good investment for a pension fund. "[T]rustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer." *Restatement* Ch. 17, Introductory Note, at 290. "[T]he downside risk built into [the market] price [of the stock may be] simply intolerable for a plan of this type," and "at the point at which company stock becomes so risky that no prudent fiduciary, reasonably aware of the needs and risk tolerance of the plan's beneficiaries, would invest *any* plan assets in it," the fiduciary must cease the investment. *Ford Motor Co.*, 590 F. Supp. 2d at 890 & 893 (emphasis in original). There is no evidence that the Petitioners even considered this highly relevant factor in deciding to continue to invest plan assets in Company stock.

In their brief to this Court, Petitioners' attorneys have suggested reasons why the Petitioners may not have been able to dispose of the Plan's holdings of Company stock and why it may have been imprudent simply to stop purchasing more Company stock. Pet. Br. 42-45 & ns. 17 & 18. However, because the District Court granted the Petitioners' motion to dismiss the complaint, the record is devoid of any evidence that the Petitioners themselves actually relied upon the reasons suggested by their attorneys, and thus it is impossible to tell whether the Petitioners actually "discharge[d] [their] duties" with the requisite level of "care, skill, prudence, and diligence." 29 U.S.C. § 1104(a)(1)(B). *See King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (internal quotation marks omitted) (courts evaluating

whether fiduciaries have breached their duties "must focus on the evidence available to the plan administrators at the time of their decision and may not admit new evidence or consider post hoc rationales."). What is more, the reasons suggested by the Petitioners' attorneys seem questionable on their face and should be subject to probing in discovery and at trial.

Petitioners' attorneys assert that the federal securities law prohibition against insider trading barred the Petitioners from disposing of the Company stock held by the Plan on the basis of the Petitioners' personal knowledge of the Company's precarious position. Pet. Br. 42. But that is just another way of saying that the Petitioners were personally disabled from fully exercising their authority to responsibly manage plan assets. ERISA gives plan fiduciaries the authority to "appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." 29 U.S.C. § 1102(c)(3). Were the Petitioners personally disabled from disposing of Company stock, because of their inside knowledge of the Company's financial conditions, the proper course would be for them to turn management of the fund over to an independent financial manager, who would not be similarly disabled. *Restatement* § 80(1) & cmt. d(1), at 156 & 159. Petitioners' attorneys assert that such a delegation would have accomplished little, since the investment managers would not have possessed the Petitioners' disabling insider information. Pet. Br. 45 n. 18. However, it is undeniable that the investment managers would have been free to make an independent assessment of whether holding Company stock continued to be a prudent plan investment unhindered by any concern that their actions would sub-

ject them to personal liability under the securities laws.[5]

Petitioners' attorneys acknowledge that the Petitioners "could lawfully cease making *new* investments" in Company stock. Pet. Br. 43 (emphasis in original). However, the attorneys characterize this course as "self-defeating," because "[i]f a company makes an unexplained decision to bar new investments by its ESOP in its own stock, the market would have ample reason to suspect that something was wrong and to react unfavorably," thereby "put[ting] at risk the considerable number of shares *already* held by the plan." *Id.* at 43-44 (emphasis in original). But the attorneys' point is a non sequitur. The Petitioners did not need to publicly announce their decision to refrain from purchasing more shares of Company stock, and, given the relatively small number of current purchases made by the Plan, their action in ceasing such purchases likely would have gone unnoticed by the market. *Id.* at 44 n. 17 ("the number of shares of employer stock already held by the plan . . . vastly exceeds the number of shares currently being acquired under the plan each year"). In any event, whether it would have been prudent to respond to the Company's financial crisis by ceasing to purchase more Company stock is a factual question that should have been tested in discovery and perhaps at trial.

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[5] To the extent that the Petitioners allowed their position as part of the Company's management to influence their management of plan assets, they were operating under a conflict of interest. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008). An independent investment manager would not have faced a similar conflict of interest.

It is possible to imagine other hypothetical justifications for the plan fiduciaries' continued investment of plan assets in Company stock. If the plan participants were relatively young and thus far from retirement, the fiduciaries could have appropriately considered the effect of continued Plan purchases of Company stock on the continued viability of the Company as a going concern and hence on the continued employment prospects of the participants. Continued employment with the Company is directly related to the participants' ability to accrue retirement benefits under the Plan and thus could have been an entirely appropriate ground for the fiduciaries' decision to continue to invest plan assets in Company stock. *See Restatement* § 77, cmt. b(1), p. 84. On the other hand, if the participants were relatively near to retirement age, the prospect of continued employment would have been less relevant than the immediate health of the fund. But the fiduciary's focus in making the decision must be on the retirement income interests of the plan participants. Since the fiduciaries here are part of the Company's management, plan investment decisions that are based on the health of the Company would raise obvious conflict of interest issues and thus must be subject to close scrutiny. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. at 108

The critical point is that, on the present state of the record, there is nothing indicating why the fiduciaries continued to invest plan assets in Company stock despite the increasingly risky nature of that investment. Precisely "because the statutory standard itself – 'prudence' – has no tidy limiting principle," it "must be applied through a thorough analysis of the facts of each case . . . rely[ing] on common sense and experience

to supplement airtight logic." *Ford Motor Company*, 590 F.Supp.2d at 892.[6] The legal presumption of prudence advocated by the Petitioners would preclude that sort of sound, concrete judicial review and thus would effectively leave employees who place their retirement savings in ESOPs unprotected from imprudent plan management.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
(Counsel of Record)
AMANDA M. JARET
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337
jcoppess@aflcio.org

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[6] The appropriate standard of judicial review is often referred to as "abuse of discretion." *Restatement* § 87, p. 242. However, "fail[ure] to satisfy the applicable standard of care, skill, and caution" is an "abuse of discretion." *Id.* cmt. c, p. 245. The standard for determining whether the Petitioners abused their discretion by failing to exercise their authority in a prudent manner is the standard of prudence set by ERISA.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-751

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IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*,

Petitioners,

v.

JOHN DUDENHOEFFER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, THE PLAN SPONSOR COUNCIL OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
STEVEN LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

MYRON D. RUMELD
Counsel of Record
MARK D. HARRIS
JOHN E. ROBERTS
RUSSELL L. HIRSCHHORN
PROSKAUER ROSE LLP
Eleven Times Square
New York NY 10036
(212) 969-3021
mrumeld@proskauer.com

Counsel for Amici Curiae

Additional counsel listed on inside cover

251880

Library of Congress
Law Library

Scott Macey
Debra A. Davis
The ERISA Industry Committee
1400 L Street, NW, Suite 350
Washington, DC 20005
(202) 789-1400

Counsel for the ERISA Industry Committee

Janet M. Jacobson
The American Benefits Council
1501 M Street NW, Suite 600
Washington, DC 20005
(202) 289-6700

Counsel for the American Benefits Council

Christina Crooks
Patrick Forrest
National Association of Manufacturers
703 10th Street NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

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Bunch v. W.R. Grace & Co.,
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CIFPT v. Loomis Sayles & Co.,
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Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.,
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Dudenhoeffer v. Fifth Third Bancorp,
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Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 12, 18

Cited Authorities

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Gray v. Citigroup, Inc. (In re Citigroup ERISA Litig.),
662 F.3d 128 (2d Cir. 2011), *cert. denied*,
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In re Suntrust Bank, Inc. ERISA Litig.,
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In re Wachovia Corp. ERISA Litig.,
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Pfeil v. State St. Bank & Trust Co.,
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Quan v. Computer Scis. Corp.,
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Taveras v. UBS AG,
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26 U.S.C. § 404(a)(9) 8

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29 C.F.R. § 2550.404a-1 10

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit design or administration under the Employee Retirement Income Security Act of 1974 ("ERISA").

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1. Counsel for each party consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici or their members made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 350 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Plan Sponsor Council of America ("PSCA") is a nonprofit association that provides services, best-practice information, and advocacy to defined contribution plan sponsors. Membership includes 1,200 companies ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is a leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber, ERIC, the Council, PSCA, and NAM (collectively, "Amici") frequently participate as amici curiae in cases with the potential to significantly affect the

design and administration of employee benefit plans under ERISA. Many of Amici's members offer their employees the opportunity to invest in stock funds similar to the one at issue here. Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed. If the decision to offer a stock fund and invest its assets in company stock is not subject to a presumption of prudence that can be applied at the motion-to-dismiss stage—as has been the law in every other circuit that has addressed the question for more than two decades—then plan sponsors are likely to discontinue that option, as their risk of ERISA liability, or the costs of defending claims, would be too great in the event of an ordinary downturn in the stock market. Accordingly, Amici file this brief to aid the Court in its understanding of the fiduciary duties at issue and the deleterious impact that affirming the Sixth Circuit's judgment could have on retirement plans that feature employer stock.

SUMMARY OF THE ARGUMENT

Seven circuits have held that fiduciaries who offer employer stock funds like Fifth Third's are entitled to a "presumption of prudence." Nearly every circuit to address the question has ruled that this presumption—which, in substance, is a standard for adjudicating a fiduciary's liability—can be rebutted only upon a showing of dire financial circumstances that would undermine the congressional purpose in encouraging employee stock ownership.

The Sixth Circuit below diverged from the "dire circumstances" test, holding that the presumption of

prudence can be overcome whenever a plaintiff proves that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." The Sixth Circuit also held that the presumption of prudence is an evidentiary, rather than a substantive, standard and therefore refused to apply it on a motion to dismiss.

The Sixth Circuit was wrong on both fronts. Unlike other investment funds—whose sole purpose is to increase an employee's retirement savings—one of the essential purposes of an employer stock fund is to permit an employee to share in the ownership and long-term success of the company for which she works. Congress specifically endorsed that goal in explicit statements of legislative purpose. It also encouraged such funds by providing tax incentives to companies that offer them and exempting the funds from various rules that would ordinarily prohibit them, including ERISA's prohibited transaction rules. Consequently, a prudent fiduciary evaluating whether to offer an employer stock fund would focus not only on the expected financial return but also on the importance of promoting employee ownership. That goal is achieved unless the employer's viability as a going concern is in doubt.

Absent a strong presumption of prudence, plan fiduciaries and corporate plan sponsors could be deterred from offering employer stock funds as an investment option for fear of the costs and risks of litigation. The typical tools ordinarily employed by fiduciaries to evaluate investment options are unavailable when an employer stock fund is at issue. Fiduciaries will therefore be ill-equipped to defend themselves from what will likely be an onslaught of lawsuits challenging their decisions to maintain stock

funds whenever the price of the stock drops (even if it subsequently rebounds). Similar adverse consequences will result if the presumption of prudence is not applied at the motion-to-dismiss stage because expensive and time-consuming discovery inexorably follows the failure to dismiss an unmeritorious claim, which pressures plan fiduciaries to settle regardless of the suit's lack of merit.

ARGUMENT

I. Congressional Policy Strongly Favors The Offering Of Employer Stock Funds, Which Provide Many Public and Private Benefits.

Employer stock funds are fundamentally different from other types of investment funds offered in conjunction with 401(k) and other employee retirement plans.[2] By definition, employer stock funds invest primarily in a single stock, whereas the typical investment fund is diversified and tailored to a particular risk profile. Consistent with their structure and composition, employer stock funds also serve different purposes. Whereas typical investment funds are offered and maintained solely to increase or preserve a participant's retirement savings, employer

2. Congress often refers to employee stock ownership plans ("ESOPs"), which are employee benefit plans that invest primarily in employer stock. Eligible individual account plans ("EIAPs") include both ESOPs and 401(k) plans, the latter of which may offer ESOP or non-ESOP stock funds as investment options. *See* 29 U.S.C. § 1107(d)(3)(A)(ii) (defining EIAPs). Fifth Third's 401(k) plan offers employees the option to invest in one or more of a variety of funds, including an ESOP fund composed primarily of company stock. We refer herein to this type of fund, as well as non-ESOP stock funds, as "employer stock funds."

stock funds are also designed to provide employees with the opportunity to participate in the ownership of their employers. *See Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) ("Congress envisioned that an ESOP would function both as an employee retirement benefit plan and a technique of corporate finance that would encourage employee ownership." (citation and internal quotations omitted)). Participation is usually voluntary. In 401(k) plans, where the employer stock fund is one of several investment alternatives, participants may choose to invest any portion of their plan accounts in that fund, while leaving the remainder for more conventional retirement saving.

Since their introduction in the 1970s, employer stock funds have become widely available on the menu of retirement plan options offered by American corporations. Employers like these funds because they provide an affordable means of raising capital. *See* 93 Cong. Rec. S40,754 (daily ed. Dec. 11, 1973) (statement of Sen. Russell Long, Chair of Senate Finance Committee when ERISA was enacted) (employee ownership plans "provide low-cost capital for the employer"). Moreover, businesses tend to experience increases in productivity, sales, and hiring following the offering of a stock fund or similar plan that encourages employee ownership. *See* Corey M. Rosen, *Employee Ownership and Corporate Performance*, *in* 1 Employee Stock Ownership Plans at 2-1 to 2-3 (Robert W. Smiley, Jr. et al. eds., 2006).

At the same time, employer stock funds offer multiple benefits to workers. Employees who own company stock report feeling more committed to their employer, and many studies have shown that they are more satisfied

with their work. *Enron and Beyond: Enhancing Worker Retirement Security: Hearing Before the H. Subcomm. on Employer-Employee Relations*, 107th Cong. 97-98 (Feb. 13, 2002) (statement of Douglas Kruse, Professor, Rutgers University). And, of course, stock funds offer employees the opportunity to share financially in the success of their employer.

For all of these reasons, employer stock funds have proven to be extremely popular among both employers and employees. It is estimated that more than 12,000 U.S. companies offer some form of an employer stock fund, with more than 14 million workers choosing to participate. *See A Statistical Profile of Employee Ownership*, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/articles/statistical-profile-employee-ownership (last visited Feb. 1, 2014).

Congress has repeatedly encouraged sponsorship of employer stock funds. To begin with, it exempted employer stock funds from ERISA's diversification requirements—which would normally limit the percentage of a plan's assets that a fiduciary could invest in any single security—as well as from prohibited transaction rules that would similarly limit plan ownership of employer stock. *See* 29 U.S.C. § 1104(a)(2) (stating that in the case of an EIAP, the diversification requirement and the prudence requirement (insofar as it requires diversification) are not violated by the acquisition or holding of employer stock); *id.* § 1107(b)(1) (exempting EIAPs from the rule that employer stock cannot compose more than 10% of an ERISA plan's total value). Congress thereby facilitated the inclusion of ESOPs and other employer stock funds in 401(k) plans.

Congress has also enacted dozens of other laws to encourage employers to offer their employees the opportunity to invest in company stock. *See* Robert W. Smiley, *ESOP Legislative History Summary*, *in* 2 Employee Stock Ownership Plans, *supra* p. 6, at A20-2 to A20-3. For example, Congress provides significant tax advantages to companies that offer stock funds to their employees. A company may deduct certain contributions that it makes to a stock fund, *see* 26 U.S.C. § 404(a)(9), as well as certain dividends paid to fund participants, *see id.* § 404(k). Moreover, owners of closely held corporations can defer taxation on capital gains from certain stock sold to an employer stock fund. *See id.* § 1042. Congress also created incentives for employees to participate in employer stock funds. For instance, the Internal Revenue Code provides special benefits to employees, such as deferred tax on "net unrealized appreciation," *id.* § 402(e)(4), and an exception from the penalty for early distributions for employer stock dividends, *see id.* § 72(t)(2)(A)(vi).

Indeed, Congress expressly found that employer stock funds and other investment vehicles that foster employee ownership offer numerous public and private benefits that should be promoted and encouraged:

> Intent of Congress Concerning Employee Stock Ownership Plans—The Congress, in a series of laws . . . has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520. Conversely, it has warned against "regulations and rulings which treat employee stock ownership plans as conventional retirement plans," lest they be regulated out of existence. *Id.*

II. The Unique Nature And Favored Status Of Employer Stock Funds Warrant A Presumption That Fiduciaries Act Prudently By Offering Them.[3]

By its terms, ERISA requires a prudent fiduciary, when faced with the decision of whether to allow employees the option to invest in a particular fund, to consider the purpose of that fund. Employer stock funds are unique investment vehicles in that they have the additional purpose of facilitating employee ownership in their employer. As such, these funds serve different goals from other investment funds, which exist purely to maximize or preserve retirement dollars.

It is therefore prudent to give employees the option to invest in a stock fund so long as the fund provides investing employees with a viable share of their employer. Only when the employer is no longer viable as a going concern would it be imprudent to allow such an investment because, in those circumstances, investing in the fund would not provide employees with a meaningful ownership interest.

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3. Although the Court granted certiorari on the question of whether the facts alleged by Respondents are sufficient to rebut the "presumption of prudence," that issue is necessarily bound up with the reasons that the presumption exists in the first instance. We accordingly address that issue here.

Six of the seven circuits to address the issue are in accord that fiduciaries act prudently when they offer employer stock funds as long as the employer's viability as a going concern is not in doubt. As discussed below, this "dire circumstances" test not only comports with ERISA's explicit definition of prudence, but it also fulfills Congress's legislative goal—embodied in ERISA and other statutes—to encourage employee ownership.

A. ERISA Defines "Prudence" By Reference To The Aims Of An Employer Stock Fund.

ERISA requires that a fiduciary act with "prudence" when discharging his duties with respect to an employee retirement plan. 29 U.S.C. § 1104(a)(1)(B). The prudence of a particular decision, in turn, is defined by reference to the standard of care that a prudent man would use "in the conduct of an enterprise *of a like character and with like aims.*" *Id.* (emphasis added). Accordingly, the measure of prudence must take into account the specific purposes of the plan option under consideration. *See* 29 C.F.R. § 2550.404a-1 (fiduciary satisfies prudence standard by giving appropriate consideration to "facts and circumstances" that are "relevant to the particular investment," including the "role" the investment plays in the plan's portfolio). In that respect, ERISA's definition of prudence corresponds to the concept of prudence found in the common law of trusts, which also looks to the goals of the trust itself. *See* Restatement (Third) of Trusts § 77(1) (2007) ("The trustee has a duty to administer the trust as a prudent person would, in light of the *purposes, terms, and other circumstances* of the trust." (emphasis added)); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.*, 472 U.S. 559, 570 (1985) (noting

that ERISA's prudence element derives from the common law); *accord* H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

The courts of appeals that have addressed the issue have all recognized that the decision to create and maintain an employer stock fund, when the plan provides for one, must be presumptively prudent given the distinct, additional purposes that such funds serve. All but the Sixth Circuit have developed a bright-line standard governing prudence in the context of these funds: Fiduciaries are presumed to act prudently when they offer employees the option to invest in an employer stock fund unless the employer's viability as a going concern is in doubt or other dire circumstances are present.[4] In that case, the policy

4. Although they have used different formulas to describe precisely what constitutes sufficiently dire circumstances to rebut the presumption, the standard is functionally the same in all six circuits. *See, e.g.*, *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 994 (7th Cir. 2013) (claim failed to "show extreme risks imposed upon participants by fiduciaries that outweigh the flexibility of a plan that allows employees to select from among a variety of investment options"); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1282 (11th Cir. 2012) ("short-term events and fluctuations in the market" insufficient to rebut presumption); *Gray v. Citigroup, Inc. (In re Citigroup ERISA Litig.)*, 662 F.3d 128, 140 (2d Cir. 2011) ("circumstances placing the employer in a 'dire situation'"), *cert. denied*,133 S. Ct. 475 (2012); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (claims failed to implicate the employer's viability "as an ongoing concern" or show "a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement" (citation omitted)); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 255 (5th Cir. 2008) ("no indication that [employer's] viability as a going concern was ever threatened");

goals that animated Congress to encourage such stock funds—and the reasons that motivate employees to invest in them—can no longer be served. The "presumption" is more aptly described as a heightened standard of proof: Fiduciaries who offer these congressionally favored plans may not be held liable under ERISA unless a plaintiff can demonstrate that the purposes behind investing in employer stock funds cannot be satisfied.

Under this test, short-term stock price fluctuations should not compel a fiduciary to jettison an employer stock fund and all of its attendant advantages. Regardless of whether the stock loses money in the short run, the stock fund's purpose of fostering employees' ability to share in the ownership of their employer would still be fulfilled.

Where, however, the company faces dire circumstances, such as an inevitable bankruptcy, offering the fund no longer advances the goal of facilitating employee ownership. Increasing employee ownership of what a fiduciary knows is a failing company is not beneficial to anyone, and a fiduciary should not be presumed prudent for continuing to offer company stock that will soon be worthless.

The "dire circumstances" test not only comports with ERISA's plain terms, but it also honors the congressional policy of encouraging employee ownership. When interpreting the prudence requirement of ERISA, "courts may have to take account of competing congressional purposes," *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)—

Edgar v. Avaya, Inc., 503 F.3d 340, 348-49 (3d Cir. 2007) ("dire situation").

here, the congressional aims to protect retirement assets while also encouraging employee ownership of employer stock. Because an undiversified stock fund is potentially volatile, ERISA's prudence requirement could, if strictly construed, preclude a fiduciary from offering an employer stock fund. *See Moench v. Robertson*, 62 F.3d 553, 570 (3d Cir. 1995) (expressing concern that absent a presumption of prudence, ERISA's goal of protecting retirement savings would "override" the goal of encouraging employee ownership). The "dire circumstances" standard honors both policy aims by protecting a fiduciary who offers employer stock funds from liability so long as those funds serve their congressionally designed purpose.

B. Ordinary Measures Of Prudence Are Inapplicable In The Context Of Employer Stock Funds.

The Sixth Circuit rejected the "dire circumstances" test, holding instead that whether a fiduciary acts prudently by offering an employer stock fund turns on whether a "prudent fiduciary acting under similar circumstances would have made a different investment decision." *Dudenhoeffer v. Fifth Third Bancorp*, 692 F.3d 410, 418-19 (6th Cir. 2012), *cert. granted*, 134 S. Ct. 822 (2013). The Sixth Circuit thus adopted the traditional test for prudence but in so doing failed to take into account the unique attributes and objectives of employer stock funds and ignored the impossibility of a fiduciary being able to satisfy its proposed test.

The duty of prudence should be applied and evaluated differently with respect to an employer stock fund. With a typical investment fund—where the sole aim is

to increase and preserve retirement savings—a plan fiduciary demonstrates his prudence by analyzing the fund's performance against various objective benchmarks, such as the risk-return ratio, the performance of the fund relative to similar "peer" funds, and the qualities and costs of the fund manager. *See, e.g.*, *Dupree v. Prudential Ins. Co. of Am.*, No. 99-cv-8337, 2007 WL 2263892, at *12, *37 (S.D. Fla. Aug. 7, 2007); *CIFPT v. Loomis Sayles & Co.*, No. 96-cv-4036, 1999 WL 1457226, at *10 (C.D. Cal. Mar. 26, 1999), *aff'd in part, vacated in part*, 259 F.3d 1036 (9th Cir. 2001); *Evaluating Performance*, FINRA, http://www.finra.org/Investors/ SmartInvesting/ AdvancedInvesting/EvaluatingPerformance (last visited Feb. 1, 2014) (explaining standard protocol for evaluating investment portfolio). A fiduciary who considers and acts upon these objective measures would be insulated from claims of imprudence even if the fund's value subsequently declined.

These traditional objective benchmarks are either inapt or inapplicable when analyzing the prudence of offering an employer stock fund. Objective indicia like risk-return ratios are unhelpful in evaluating employer stock funds because funds holding a single asset are inherently more volatile and, therefore, are considered risky. Moreover, it is pointless for a fiduciary to compare the performance of the employer's stock with "peer" investments—such as competitors' stock—because the purpose of these funds is to provide employees with the opportunity to invest in *their* employer even if the employer's stock is not among the best performing investments. Nor can the cost or quality of fund managers be considered as part of the prudence analysis because

employer stock funds require no traditional management. Indeed, Congress effectively decided that the ordinary standards for evaluating the prudence of an investment fund do not apply in the context of an employer stock fund by declaring that it is not imprudent to offer such funds even though they are undiversified and permit employees to place all of their retirement eggs in a single basket. *See* 29 U.S.C. § 1104(a)(2).

As a practical matter, then, a fiduciary trying to demonstrate the prudence of offering an employer stock fund would not have at his disposal any of the ordinary measures of prudence. And the decision below provides no further guidance as to how a court would evaluate the fiduciary's prudence in this context. If the Sixth Circuit's holding carries the day, fiduciaries will find themselves with little idea of how to measure the propriety of offering an employer stock fund and few means of defending themselves if they are sued following a stock-price drop. Thus, fiduciaries would have stronger incentives to abandon employer stock funds altogether to reduce their litigation costs (and risk). Of course, abandoning an employer stock fund for fear of being sued on a prudence theory might also expose a fiduciary to other claims if the employer's stock price subsequently rises. *See, e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 5-6 (1st Cir. 2009) (fiduciary sued for causing plan to divest of employer stock that subsequently rose in value); *see also Moench*, 62 F.3d at 571-72 ("[I]f the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive."). The Sixth Circuit's rule thus leaves fiduciaries caught

"between the devil and the deep blue sea." *Lanfear v. Home Depot, Inc.*, 679 F. 3d 1267, 1282 (11th Cir. 2012).[5]

In the Solicitor General's amicus brief at the petition stage, the Government proposed another standard for prudence: Offering an employer stock fund is imprudent whenever a fiduciary "reasonably should have known" that the stock was "significantly overvalued." *See* Brief for the United States as Amicus Curiae ("U.S. Brief") at 9-10. That standard is fatally flawed.

The Government's proposed approach is tantamount to demanding that the plan fiduciaries have clairvoyance regarding the future movement of stock prices. A fiduciary faced with the same universe of public information as the rest of the market cannot be expected to divine when the employer's stock price is inflated such that further investment would be unwise. *See, e.g., Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010) ("Fiduciaries are not expected to predict the future of the company stock's performance."); *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 408 (7th Cir. 2006) (Posner, J.) ("A trustee is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him.").

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5. For similar reasons, a standard proposed by some circuits wherein the strength of the presumption depends on the particular language of the plan is also unworkable. *See, e.g., Taveras v. UBS AG*, 107 F.3d 436, 443-46 (2d Cir. 2013). Whether the plan requires or merely allows the creation or maintenance of an employer stock fund, a presumption of prudence is always warranted regardless of the specific wording of the plan language so long as offering the fund facilitates employee ownership of employer stock.

There may be situations in which a fiduciary is a company insider who has access to non-public information that would put him in a better position to evaluate the value of an employer's stock price than the market as a whole. But employees "have no right to insist that fiduciaries who are corporate insiders use inside information to the advantage of the participants." *Lanfear*, 679 F.3d at 1282; *see also White v. Marshall & Isley Corp.*, 714 F.3d 980, 982 (7th Cir. 2013) (stating that a fiduciary who uses "insider information for the benefit of employees . . . would violate federal securities laws"). The Court should not craft additional obligations or rules through an interpretation of ERISA's prudence requirement in a manner that would conflict with other laws, such as the federal securities laws.

C. The Presumption Of Prudence Applies At The Motion-To-Dismiss Stage.

It is now well established that a plaintiff must plead facts that, if proven, would raise a right to relief beyond a speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In the ruling below, however, the Sixth Circuit became the only circuit to refuse to apply the presumption of prudence on a motion to dismiss. In explaining its rationale, the court noted that it has not adopted the other circuits' "dire circumstances" test for rebutting the presumption. *See Dudenhoeffer*, 692 F.3d at 418-19. Instead, the Sixth Circuit has adopted a standard pursuant to which a plaintiff could rebut the presumption merely by showing that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 591 (6th Cir.) (citation omitted), *cert. denied*, 133 S. Ct. 756 (2012). The court below noted

that this standard would be difficult to apply on a motion to dismiss because by its nature it concerns "questions of fact." *See Dudenhoeffer*, 692 F.3d at 419 n.1.

This is incorrect. A plaintiff's complaint must articulate plausible facts that, if proven, would support a theory sufficient to overcome the presumption of prudence. Indeed, a straightforward application of *Twombly* leads to the inexorable conclusion that if a plaintiff does not plead facts that, if proven, would be sufficient to overcome the presumption of prudence, then the complaint must be dismissed. The other courts of appeals correctly recognize that the presumption of prudence is in substance a standard of review for a claim that a plan fiduciary has breached his duty of prudence in offering an employer stock fund. *See, e.g., Gray v. Citigroup (In re Citigroup ERISA Litig.)*, 662 F.3d 128, 139 (2d Cir. 2011). To prevail upon that claim, a plaintiff therefore must establish facts that overcome the presumption. *See Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2013), *petition for cert. filed*, No. 13-578 (Nov. 7, 2013); *White*, 714 F.3d at 990-91; *Lanfear*, 679 F.3d at 1281; *Citigroup*, 662 F.3d at 139; *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007). This Court should reject the Sixth Circuit's vague formulation of the standard for overcoming the presumption of prudence and its refusal to apply the presumption at the pleading stage.

III. Sponsors Will Be Discouraged From Offering Employer Stock Funds Absent A Strong Presumption Of Prudence That Applies At The Pleading Stage.

If the presumption of prudence as applied by the majority of circuits is weakened or eliminated, or if it is held not to apply at the pleading stage, sponsors will be

less likely to offer employer stock funds as an investment option. In recent years, ERISA fiduciaries have confronted an explosion of so-called "stock-drop" lawsuits. *See* Robert P. Davis et al., *The Outlook for ERISA "Stock-Drop" Litigation*, N.Y.L.J., Feb. 17, 2009, at S3. The bulk of those suits have been dismissed on the pleadings because the plaintiff failed to allege facts that could overcome the presumption of prudence. *See, e.g.*, *In re Suntrust Bank, Inc. ERISA Litig.*, No. 1:08-cv-3384, 2013 WL 5418130 (N.D. Ga. Sept. 26, 2013); *In re Wachovia Corp. ERISA Litig.*, No. 3:09-cv-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010).[6]

If the standard for overcoming the presumption is weakened or rendered inapplicable at the pleading phase, the costs of offering employer stock funds would increase dramatically. The plaintiffs' bar will surely rush to file nuisance suits every time a company's stock price drops. Because prudence claims are fact-intensive, discovery is costly and burdensome. Consequently, when such claims do survive a motion to dismiss, fiduciaries are often pressured into settling claims for large sums of money. *See Twombly*, 550 U.S. at 558 (recognizing that the expense and inconvenience of discovery often compel a defendant to settle even an unmeritorious suit); *cf. ERISA Class Action Settlements & Attorney Fees (2010)*, Fiduciary Counselors, Inc., http://www.erisasettlements.com/press/ERISA-Chart.pdf (last visited Feb. 1, 2014) (noting that ERISA class actions involving employer stock often settle for tens of millions of dollars).

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6. To date, not a single plaintiff has won a full trial on the merits in a breach-of-duty stock-drop suit involving a publicly traded company.

Even if plan fiduciaries ultimately prevail in defending the prudence of their actions, the sheer cost of defending stock-drop claims in the absence of a strong presumption of prudence could deter plan sponsors from maintaining employer stock funds. The Government attempts to downplay concerns about weakening or eliminating the presumption of prudence by observing that the fiduciary can simply prove prudence at trial. *See* U.S. Brief 12-13. But even in cases like *DiFelice v. U.S. Airways, Inc.*, a case where the fiduciary prevailed *following a full trial*, 497 F.3d 410, 413-14 (4th Cir. 2007), the defendant undoubtedly incurs millions of dollars in litigation fees and costs to defend the ultimately meritless suit. *See also Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 2 (1st Cir. 2009), *cited in* U.S. Brief 13 (defendant fiduciary prevailed upon summary judgment only after incurring the expense and inconvenience of discovery). If fiduciaries cannot obtain dismissal of baseless stock-drop suits at an early stage of the litigation, they will be less likely to offer employer stock funds in the first instance for fear of incurring significant legal fees to defend the prudence of their decisions.

That result would be precisely what Congress warned against when it first crafted the special standards governing employer stock funds. "Congress is deeply concerned that the objectives sought" by its laws encouraging employee stock ownership "will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans" and "which reduce the freedom of . . . employers to take the necessary steps to implement the plans, and which otherwise block the establishments and success of these plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520.

To ensure the continued success of employer stock funds, the Court should hold that a plaintiff claiming that it was imprudent for a plan fiduciary to offer an employer stock fund must plead plausible facts to establish that the employer was not viable as a going concern.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

KATE COMERFORD TODD
STEVEN LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

MYRON D. RUMELD
Counsel of Record
MARK D. HARRIS
JOHN E. ROBERTS
RUSSELL L. HIRSCHHORN
PROSKAUER ROSE LLP
Eleven Times Square
New York NY 10036
(212) 969-3021
mrumeld@proskauer.com

Counsel for Amici Curiae

SCOTT MACEY
DEBRA A. DAVIS
THE ERISA INDUSTRY COMMITTEE
1400 L Street, NW, Suite 350
Washington, DC 20005
(202) 789-1400

Counsel for the ERISA Industry Committee

JANET M. JACOBSON
THE AMERICAN BENEFITS COUNCIL
1501 M Street NW, Suite 600
Washington, DC 20005
(202) 289-6700

Counsel for the American Benefits Council

CHRISTINA CROOKS
PATRICK FORREST
NATIONAL ASSOCIATION OF MANUFACTURERS
703 10th Street NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

AMICUS CURIAE BRIEF

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AND
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In the
Supreme Court of the United States

FIFTH THIRD BANCORP, ET AL.,

Petitioners,

v.

JOHN DUDENHOEFFER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* DELTA AIR LINES, INC., IN SUPPORT OF PETITIONERS

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Amicus Curiae

February 3, 2014

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INTEREST OF *AMICUS CURIAE*

Delta Air Lines, Inc. is one of the world's largest airlines.[1] Delta operates more than 5,000 flights each day and has nearly 80,000 employees. Since 1971, Delta has offered its employees a pension and profit-sharing plan known as the Delta Family Care Savings Plan ("Plan") that has encouraged investments in Delta stock; Delta also made matching contributions to employees' accounts in the form of company stock.

Delta has learned first-hand how a precipitous drop in share price can attract ERISA litigation that employs 20/20 hindsight to question fiduciaries' decision to invest in company stock. Since 2004, Delta has been embroiled in "stock drop" class-action litigation under ERISA, in which the plaintiffs allege that the Plan's fiduciaries should have liquidated all holdings of Delta stock when the company—and, indeed, the entire airline industry—experienced business challenges in the early 2000s. *See Smith v. Delta Air Lines*, No. 04-cv-2592 (N.D. Ga.), *appeal pending* No. 13-15155 (11th Cir.).

That litigation does not involve allegations that material information was withheld from the market, such that Delta stock was trading at an artificially inflated price. Nor was Delta subject to securities actions making similar allegations. Instead, Delta has spent years litigating a case premised on the notion that fiduciaries of a Plan designed to foster employee

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

ownership of Delta stock invested in Delta stock at the wrong time.

Delta accordingly has a strong interest in ensuring that ERISA is properly interpreted in light of the unique features of employee stock ownership plans.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has long viewed employee ownership of employer stock as "a goal in and of itself." *Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995). That is, Congress views employee stock ownership plans as a "device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). Countless employers, including Delta, offer ERISA-regulated plans that include investments in company stock. Consistent with Congress' policy goals, the purpose of these plans is to align incentives between employees and stockholders, ensure that employees have a vested stake in the company's long-term growth, and provide an additional source of retirement savings.

Many of those same companies have also been targeted by plaintiffs' lawyers in class-action suits under ERISA. Although such lawsuits often include allegations of fraud or accompany securities litigation, plaintiffs have not viewed such allegations as necessary. Rather, companies that offer investments in employer stock have faced meritless and burdensome ERISA litigation often premised on a drop in stock price alone, without any allegation of

fraud, illegality, improper accounting, or other wrongdoing.

Delta's experience in this regard has been indicative of companies that have had to endure years of litigation because they decided to adopt an employee stock ownership plan ("ESOP") and, in hindsight, their stock proved to be a poor investment during certain time periods. During the early 2000s, Delta—like every other full-service airline—faced a number of business challenges, including reduced consumer demand in the wake of the 9/11 attacks, high fuel prices, and vigorous competition from new entrants. But at the same time, Delta took aggressive and unprecedented steps to turn the company around and position it for long-term success. At every step of this process, all relevant information about Delta and the airline industry was known to the market; there is no allegation that Delta misstated earnings, overvalued assets, covered up negative results, or took any other steps that would have caused its stock price to be artificially inflated.

Instead, the plaintiffs in Delta's ERISA case simply allege that the fiduciaries of Delta's ESOP plan should have been able to foresee that the company's turnaround efforts would not succeed. The plaintiffs contend that ERISA required the fiduciaries of Delta's ESOP plan to disregard their specific instructions and divest the plan of all Delta stock while the turnaround plans were proceeding. And they insist that a significant stock drop, combined with amorphous allegations of "mismanagement," should be enough to survive a motion to dismiss.

Delta strongly agrees with Petitioners that ERISA fiduciaries' decisions to allow investments in employer stock should be subject—at the pleading stage—to a highly deferential abuse-of-discretion standard. Indeed, such a deferential standard is particularly appropriate in mere stock-drop cases. Whatever this Court decides about the appropriateness of that standard more generally, it is vital that a deferential standard apply when plaintiffs allege no more than a stock-drop or offer only vague allegations of mismanagement.

Such a standard is necessary to effectuate the basic congressional policy behind ESOPs. The policies behind ESOPs apply fully whether share prices are falling or rising, and a falling market allows employees to obtain a larger share of the company "on the cheap." Investments in company stock are typically made for the long-run, and fiduciaries cannot be expected to engage in a quixotic effort to avoid losses by trading in response to short-term price swings. To be sure, an employee's shares, like management's shares, can lose much of their value if the company ultimately fails. But fiduciaries of an ESOP cannot be expected to outsmart the market, nor can they be made insurers against the risk of bankruptcy.

Even the United States concedes that a plaintiff should not be able to state a claim merely because "the company or industry was suffering financial difficulties." But the government then advocates several steps—such as eliminating the deferential standard of review altogether—that would eviscerate companies' primary protections against such frivolous

claims. At a minimum, this Court should convert the government's concession into a concrete rule that will protect fiduciaries from claims that they should have anticipated a stock drop. When there is no allegation that a company's stock price reflected anything other than its true value, claims challenging a plan fiduciary's investments in employer stock should be subject, at the pleading stage, to a highly deferential abuse-of-discretion standard of review.

ARGUMENT

I. The ERISA Class-Action Claims Against Delta Exemplify The Meritless Stock-Drop Claims That Should Be Subject To A Deferential Standard Of Review.

A. The class-action ERISA claims that have been pending against Delta since 2004 offer a prime example of why a deferential standard of review is needed to protect ESOP fiduciaries from meritless "stock drop" litigation. *See Smith v. Delta Air Lines*, No. 04-cv-2592 (N.D. Ga.).

Since 1971, Delta has offered eligible employees a defined-contribution "401(k)" benefit plan, which is funded through employees' own voluntary contributions as well as matching funds contributed by the company. For their voluntary contributions, plan participants could choose from a number of different investment options, one of which was a fund that invested in Delta common stock. The plan also provided that Delta's matching contributions would be made using Delta stock. In short, Delta took advantage of Congress' invitation to create an ESOP that gave employees a direct stake in the company. The fiduciaries of the plan could not alter that

foundational feature of the plan without changing its fundamental character as an ESOP.

Like every other full-service airline, Delta encountered a number of significant business challenges in the early 2000s. The September 11th attacks led to a sharp decrease in consumer demand, as well as higher fuel prices as a result of the subsequent conflicts in the Middle East. Full-service carriers also faced new competition from low-cost entrants at the same time that they were struggling with expensive union contracts signed during flush times in the late 1990s. As a result of these challenges, Delta incurred several straight quarters of losses, and its stock price fell significantly between 2000 and 2004.

At the same time, Delta was taking aggressive steps to address each of those challenges. Among other measures, Delta cut prices and revamped its fare structure; laid off 16,000 employees; replaced its CEO; reduced frequent-flier benefits; sold several new jets and a fuel hedge portfolio to generate cash; built up cash and liquidity reserves; and launched a new low-cost subsidiary. In short, Delta faced multiple challenges but was taking decisive action to confront those challenges and position the company for long-term profitability and growth. At several times during this difficult period, Delta's stock price outperformed the market, thus suggesting that the market believed Delta's turnaround efforts were on the right track.

Nonetheless, in August 2004, Delta made a decision to alter the plan terms to authorize an independent assessment of whether continued investments in Delta shares were advisable. An

independent investment manager ultimately decided to suspend such purchases in September 2004, and Delta entered bankruptcy in September 2005.

B. Delta has been embroiled in class-action ERISA litigation since 2004. Relying solely on hindsight, the plaintiffs allege that the fiduciaries of Delta's plan *should have known* as early as September 2000 that Delta stock was an imprudent investment and that the company would ultimately go bankrupt. *See* Amended Complaint ¶¶ 182-84, *Smith v. Delta Air Lines*, No. 04-cv-2592 (N.D. Ga. Mar. 16, 2005) (DN 42). The plaintiffs contend that—in light of Delta's falling stock price—the plan's fiduciaries had a duty under ERISA to deviate from the clear terms of the plan and liquidate all holdings of Delta stock. *Id.* ¶¶ 205-13.

The claims against Delta exemplify everything that is wrong with stock-drop class actions under ERISA. The plaintiffs' allegations are based solely on publicly available press releases, financial statements, and news sources. The complaint does not identify any material information about Delta's financial situation that was known by the fiduciaries but not disclosed to the market. Nor does it allege that Delta's stock traded at an artificially inflated price due to fraud, improper accounting practices, overvaluation of assets, or material misstatements about the company's prospects. And Delta has never faced an SEC enforcement action or private securities litigation under Rule 10b-5.

In short, at every step of the way, Delta's stock price reflected the market's collective judgment about the value of the company and its prospects for future

growth. The crux of the plaintiffs' complaint is that the fiduciaries of Delta's plan should have known *better* than the market what the future held for Delta, and that they should have used that perfect foresight to depart from the clear terms of the plan and liquidate all holdings of Delta stock.

In Delta's ERISA case, the district court has correctly concluded (twice) that the plaintiffs' stock-drop allegations fail to state a claim under ERISA. *See* Order, *Smith v. Delta Air Lines*, No. 04-cv-2592 (N.D. Ga. Nov. 1, 2013) (DN 121); *Smith v. Delta Air Lines*, 422 F. Supp. 2d 1310 (N.D. Ga. 2006). But those decisions relied in part on the deferential standard of review for a plan's investments in employer stock. And the plaintiff continues to argue on appeal that a stock drop plus amorphous allegations of "mismanagement" should be sufficient to survive a motion to dismiss and proceed to discovery. *See* No. 13-15155 (11th Cir.).

As explained below, however this Court resolves any broader questions about the presumption of prudence for fiduciaries of ESOPs, it should make clear that simple stock-drop claims such as the claims against Delta are subject to a deferential abuse-of-discretion standard that is fully applicable at the motion-to-dismiss stage of the litigation.

II. A Deferential Abuse-Of-Discretion Standard Should Apply When There Are No Plausible Allegations That The Employer's Stock Price Was Artificially Inflated Or Overvalued.

Even the United States apparently agrees that claims against an ESOP fiduciary alleging nothing more than a stock drop—such as the claims against

Delta—do not suffice and should be dismissed for failure to state a claim. In a single sentence in its invitation brief, the United States concedes (at 12) that "a plaintiff cannot state a claim merely because the company or industry was suffering financial difficulties." That concession is important. The whole point of ESOPs is to encourage employee ownership of the employer's stock. The policies behind employee ownership are not limited to a rising market or to companies that experience steady growth. Thus, fiduciaries need to be protected against litigation when the employer's stock turns out in hindsight to have been a relatively unattractive investment over a defined period of time.

But while the United States is clear that such allegations do not suffice, it is far less clear how fiduciaries and companies will be protected against such litigation going forward. In practice, the primary protection against frivolous stock-drop litigation has been robust application of the abuse-of-discretion standard at the motion-to-dismiss stage. Yet the United States would discard that standard and, in all events, argues that the deferential standard should not apply at the motion-to-dismiss stage. The United States is wrong on both counts, as Petitioners explain at length.

But at a bare minimum, this Court must convert the government's concession into concrete protection for defendants faced with nothing more than allegations that the stock dropped and the fiduciaries should have known that poor performance—or even bankruptcy—was imminent. In those circumstances, the abuse-of-discretion standard should apply with

full force at the motion-to-dismiss stage. This Court should expressly hold that complaints merely alleging a stock drop—without more—do not state a claim under ERISA and should be dismissed.

A. At a Minimum, Fiduciaries of an ESOP Plan Should Have No Obligation To Deviate from the Plan Unless They Know That the Market Price Is Artificially Inflated.

As Petitioners ably explain, *all* decisions by an ESOP fiduciary to invest in employer stock should be governed by a deferential standard of review that can be overcome only in extraordinary circumstances. *See* Pet. Br. 21-44. But, at the very least, this Court should hold that the deferential abuse-of-discretion standard applies to claims alleging nothing more than a stock drop, with no allegations that the stock price was artificially inflated or overvalued by information withheld from the market.

1. Congress has long expressed a clear policy in favor of employee ownership of employer stock, as reflected in ERISA and a number of other federal statutes. The ultimate goal of employee stock ownership plans is to "merge[] the roles of capitalist and worker," *Donovan*, 716 F.2d at 1458, to ensure that employees have a vested stake in the success of their employer.

That policy of promoting employee stock ownership applies with full force whether a company is enjoying good times or struggling through a difficult period. It would hardly serve Congress' goals—and, indeed, would directly undermine them—if ERISA were construed to place fiduciaries in legal jeopardy

merely because they continued to allow investments in company stock after the price had recently fallen. "Buy low and sell high" is a bedrock principle of investing. If plan participants are allowed to invest in company stock when the price is low, they will have the opportunity to earn very strong returns if the company subsequently returns to profitability. And allowing employees to purchase their employer's shares at historical lows would also mean that employees could obtain a relatively large number of shares, which would mean an even greater degree of employee ownership in the event of a turnaround.

To take just one example, in the mid-1990s, Apple faced major business challenges and its stock fell to a 10-year low of approximately $4 per share (down nearly 80% from its peak). The company was "hemorrhaging money and market share and lacked leadership," and it had "flooded the market" with a "confusing array" of new products. *See* Jason D. O'Grady, *Apple Inc.* 34 (2009). Apple "should, by all accounts, have gone bankrupt sometime in 1995 or 1996," and was "on its deathbed in 1997." *Id.* Yet if the fiduciaries of Apple's benefit plan had liquidated their holdings of company stock during that difficult period, they would have deprived employees of a 15,000% return over the next 15 years as the company recovered and returned to profitability. Nothing in ERISA should be construed as requiring fiduciaries to unload company stock just because the going has gotten tough.

Relatedly, courts have emphasized that employee stock ownership plans are typically "designed for the long haul," and "[m]arket timing is not how prudent

pension fund investing usually works." *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1282 (11th Cir. 2012). At any given point in time, the price of a stock is the "best estimate available ... of the company's value." *Summers v. State Street Bank*, 453 F.3d 404, 408 (7th Cir. 2006). Nothing in ERISA requires a fiduciary to "act on the assumption that the market was overvaluing" the employer's stock. *Id.*

The United States contends (at 13) that the deferential standard of review should not apply if "it is plausibly alleged that petitioners knew (or should have known) that the stock price was significantly inflated due to market misrepresentations or could have ascertained that fact from a proper investigation." Even under those circumstances, there are strong arguments, persuasively presented by Petitioners, that a presumption of prudence should still apply. Pet. Br. 42-44. For example, even if the fiduciaries are aware of information suggesting that the company's stock is overvalued, they could determine that any drop in price is likely to be temporary, and that the stock remains a good long-term investment. And, as Petitioners explain, nothing in ERISA imposes an obligation on fiduciaries to trade based on inside information. Pet. Br. 42-43.

But, in all events, this Court should hold at an absolute minimum that when there are no allegations that the stock price is artificially inflated or overvalued, fiduciaries are entitled to deferential abuse-of-discretion review when they invest in employer stock pursuant to the terms of the plan. Any other rule would impose on fiduciaries an impossible burden of omniscience. As Judge Posner has

explained on behalf of the Seventh Circuit, "determining the 'right' point, or even range of 'right' points, for an ESOP fiduciary to break the plan and start diversifying may be beyond the practical capacity of the courts to determine." *Summers*, 453 F.3d at 411.

Plan fiduciaries are not insurers of a stock's successful performance, and when they allow investments in company stock pursuant to the plain terms of an ESOP plan, they should be protected by a strong presumption that their actions were entirely appropriate. As noted, the congressional policies behind ESOPs are not limited to bull markets or growth stocks. In similar fashion, fiduciaries of ESOP plans should be fully entitled to rely on the market price for the company stock, and fully entitled to purchase equity for the employees on the cheap, even in a falling market.

Delta generally agrees with Petitioners' formulation of the test. Consistent with decisions such as *Moench*, 62 F.3d 553, and *Lanfear*, 679 F.3d 1267, Petitioners contend that a plaintiff should not be able to state a claim absent "extraordinary circumstances that would render continued investment in employer securities imprudent *in the context of an ESOP*." Pet. Br. 19, 23-24, 30, 45. But certain language in Petitioners' brief could be construed as suggesting a narrower protection for plan fiduciaries. *See* Pet. Br. 16 ("serious threat to the employer's viability"); *id.* at 17 ("serious threat to the company's ongoing viability"); *id.* at 28, 34 (same). It should take more than a "serious threat" to trigger an obligation to break the terms of the plan and divest an

ESOP of company stock. As noted above, many companies will ultimately recover from "serious threats," and employees should not be deprived of the opportunity to invest in a company during its turnaround.

Consistent with well-established precedent among the lower courts, this Court should hold that a fiduciary has no obligation to divest a plan of employer stock unless the circumstances are so dire that *no reasonable fiduciary* could have concluded that employer stock remained a prudent investment. *See Lanfear*, 679 F.3d at 1281; *White v. Marshall & Ilsey Corp.*, 714 F.3d 980, 988 (7th Cir. 2013) (plaintiffs challenging the prudence of holding employer stock must show that "the circumstances were so compelling that no reasonable fiduciaries would have thought they should continue to offer the stock as directed in the plan"); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011). Any less-deferential standard would not provide adequate protection for fiduciaries who allow employees to continue investing in company stock during difficult times so that the employees could also share in the gains if the company subsequently recovers.

2. The fact that a company ultimately filed for bankruptcy should not affect application of the deferential standard of review to simple stock-drop claims. A fiduciary's decision to allow investments in employer stock must be judged "based upon information available to the fiduciary at the time of each investment decision and not 'from the vantage point of hindsight.'" *Citigroup*, 662 F.3d at 140; *see DiFelice v. U.S. Airways*, 497 F.3d 410, 424 (4th Cir.

2007) ("whether a fiduciary's actions are prudent cannot be measured in hindsight, whether this hindsight would accrue to the fiduciary's detriment or benefit"). That is, "the ultimate outcome of an investment is not proof of imprudence" because ERISA "'requires prudence, not prescience.'" *DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990).

Following a downturn, some companies may quickly return to profitability, while others will ultimately be forced to file for bankruptcy. The latter situation is of course unfortunate, but it is unfortunate for all shareholders, whether management, employees, or third parties. A plan fiduciary cannot be expected to know in advance whether a company's turnaround efforts will succeed or fail. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) (the "[s]tock price benefits" from a company's actions might only be realized "years into the future"). Congress was well aware that investment in the stock of a single company could carry "significant risk," but it nonetheless concluded that "the possible benefits to employees and employers from undiversified investments in employer stock ... out-weigh the risks inuring from such strategy." *DiFelice*, 497 F.3d at 424-25.

For similar reasons, plaintiffs should not be allowed to plead around the deferential standard of review by alleging a stock drop plus amorphous claims of "mismanagement." For example, in Delta's case, the plaintiffs argue that the company *must* have been mismanaged because it ultimately filed for bankruptcy. *See* Appellant's Br. at 44-45, *Smith v.*

Delta Air Lines, No. 13-15155 (11th Cir. Dec. 30, 2013).

Such arguments are the very definition of impermissible hindsight. Every time a company files for bankruptcy, it is easy to allege, with perfect hindsight, that the company's managers should have made different decisions and that fiduciaries should have realized the turnaround strategy was destined to fail. But, absent specific allegations that the fiduciaries were aware of information that had not been disclosed to the market, there is no reason to think that the shares were mispriced. Companies facing serious difficulties generally trade at substantial discounts, which reflect the possibility of a turnaround or bankruptcy. If fiduciaries cannot rely on the market in such situations, employees will lose out on historic buying opportunities when bankruptcy is avoided. And when bankruptcy is not avoided, alleging mismanagement hardly justifies eliminating the appropriately deferential standard of review. Turnaround efforts can fail based on factors entirely outside the control of management.

B. The Deferential Standard of Review Should Apply at the Motion-To-Dismiss Stage.

A deferential standard of review for fiduciaries' investments in employer stock—especially when there are no allegations that the market price of the stock reflected anything other than the true price—is critical to achieving Congress' goal of promoting employee ownership of employer stock. But it is not sufficient. The Court should also hold that the deferential standard of review is a substantive rule of

law that applies with full force at the motion-to-dismiss stage. *See* Pet. Br. 45-50.

As noted above, the United States concedes (at 12) that "a plaintiff cannot state a claim merely because the company or industry was suffering financial difficulties." In support of that proposition, the government cites the Fourth Circuit's decision in *DiFelice v. U.S. Airways*, 497 F.3d 410. Like the claims against Delta, *DiFelice* involved stock-drop claims against an airline arising out of the difficulties faced by the airline industry in the early 2000s. *See id.* at 415-16. The Fourth Circuit correctly held that "the Employees cannot succeed in this lawsuit simply by demonstrating that U.S. Airways offered the Company Fund during a time of grave uncertainty for the company, no matter how significant the Employees' ultimate financial losses." *Id.* at 425.

But the Fourth Circuit reached that conclusion only after years of litigation and a full-blown bench trial.[2] There is thus a profound disconnect between the government's proclamation that "a plaintiff cannot *state a claim*" merely by alleging financial difficulties, which suggests a motion to dismiss standard, and its citation of the Fourth Circuit's post-trial determination in *DiFelice*. Indeed, the government's proposed resolution of this case—*i.e.*, eliminating the presumption of prudence and/or applying that standard only at a late stage of the proceedings—

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[2] Similarly, stock-drop claims against the trustees of United Air Lines' ESOP were dismissed only after discovery and summary judgment briefing. *See Summers*, 453 F.3d at 407-09 (fiduciaries were not "required to act on the assumption that the market was overvaluing United").

would only make it more likely that cases such as *DiFelice* survive a motion to dismiss.

The presumption of prudence and its availability at the motion-to-dismiss stage are the primary tools courts have used to conclude that stock-drop cases do not state a claim for relief. Eliminating those tools will all but guarantee plaintiffs an opportunity to obtain costly discovery even in cases where plaintiffs cannot state a valid claim. As Judge Cabranes recently explained on behalf of the Second Circuit, "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *PBGC v. Morgan Stanley*, 712 F.3d 705, 719 (2d Cir. 2013). Needless to say, allowing meritless claims to survive for years of discovery and pre-trial proceedings would not advance the purposes of ERISA.

The bottom line is that a fiduciary of an ESOP plan investing in the company's stock is an utterly predictable and congressionally sanctioned occurrence. Before that act can be the basis for a federal lawsuit, plaintiffs should have to allege far more than a price-drop and "mismanagement." Indeed, in the absence of specific allegations that the share price was overvalued and the fiduciaries knew of that overvaluation, there is no plausible basis for the fiduciaries to do anything other than continue to purchase equity for employees. Without such allegations, fiduciaries should not have to endure the burdens of a trial as in *DiFelice*. Rather, courts need the tools to dismiss such actions at the threshold.

CONCLUSION

For the reasons articulated by the Petitioners, this Court should reverse the judgment of the Sixth Circuit and hold that claims against an ESOP fiduciary arising out of investments in employer stock are governed, at all stages of the proceedings, by a deferential abuse-of-discretion standard. At a minimum, however, the Court should hold that defendants are entitled to deferential review when there are no allegations that the price of the company's stock was artificially inflated or overvalued. Congress has made a reasoned policy decision that employee ownership of employer stock is "a goal in and of itself," *Moench*, 62 F.3d at 568, and fiduciaries who act in furtherance of that goal should not be forced to reckon with years of litigation based on specious claims that they should have outsmarted the market.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Amicus Curiae

February 3, 2014

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v.

JOHN DUDENHOEFFER, *et al*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE ESOP ASSOCIATION IN SUPPORT OF PETITIONERS

LAURENCE A. GOLDBERG
LYNN H. DUBOIS
ESOP Law Group, LLP
Four Embarcadero Center
14th Floor
San Francisco, CA 94111
(415) 766-3512

CHARLES M. DYKE
Counsel of Record
SEAN T. STRAUSS
Trucker ✦ Huss
A Professional Corporation
One Embarcadero Center,
Suite 1200
San Francisco, CA 94111
(415) 788-3111
cdyke@truckerhuss.com

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White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013) 8, 9, 15, 17

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American Job Creations Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) 23

Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) 23

Economic Recovery Tax Act, Pub. L. No. 97-34, 95 Stat. 172 (1981) 22

Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 102(5), 301(e), 87 Stat. 985, 987, 1005 (1974) 21

Small Business Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) 22

Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975) 22

Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1590 (1976) 16, 22

Other Authorities

129 Cong. Rec. S16, 637 (daily ed. Nov. 17, 1983) ... 23

Benjamin Graham, The Intelligent Investor 18-34 (rev. ed. 1984) 13

Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* 12, 13, 15

Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?*, 26 Hofstra Lab. & Emp. L.J. 497, 536-37 (2009) 7

Corey M. Rosen et al., Employee Ownership in America 15 (1986) 21

Corey Rosen, *Employee Ownership and Corporate Performance A Review of Research on U.S. Companies*, at 22, 27 (2011), *available at* http://www.nceo.org/Employee-Ownership-Corporate-Performance/pub.php/id/50/ 23

Corey Rosen, *The State of the Broad-Based Employee Ownership Plans*, at 12 (2013) 25

Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(k) Plans*, 14 Elder L.J. 1, 6 (2006) 20

Elana Ruth Hollo, *The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy*, 23 Rutgers L.J. 561, 563 n.9 (1992) 20, 21, 22

George Gleason Bogert et al., *The Law of Trusts & Trustees* § 612 (3d ed. 2000) 12, 13

H.R. Rep. No. 92-1280, at 58 (1974) (Conference Report) 1974 U.S.C.C.A.N. 5038, 5097 22

Jeff Gates, The Ownership Solution, Toward a Shared Capitalism for the Twenty-First Century 53 (1998) 22

Louis O. Kelso & Mortimer J. Adler, *The Capitalist Manifesto* 169-70 (1958) 21

M. Norman Goldberger, *Responding to Enforcement and Disclosure Requirements in the Securities Law Realm*, Aspatore, October 2011, *available at* 2011 WL 5053667 7

Michel E. Murphy, *The ESOP at Thirty: A Democratic Perspective*, 41 Willamette L. Rev. 655, 656 (2005) 21

Restatement (Third) of Trusts § 227 cmt. e 12, 13

Restatement (Third) of Trusts § 227 cmt. f 13, 15

Restatement (Third) of Trusts § 227 cmt. g 12, 13

Restatement (Third) of Trusts § 227 cmt. h 13

Steven F. Freeman, *Effects of ESOP Adoption and Employ Ownership: Thirty Years of Research and Experience*, at 7 24

Steven J. Arsenault, *Aesop and the ESOP: A New Fable About Dividends and Redemptions*, 31 Va. Tax Review 545, 548 n.9 (2012) 20

The ESOP Association, Employee Ownership & Corporate Performance, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014) 24

The ESOP Association, ESOP Fact Sheet, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014) 3

The ESOP Association, ESOP Statistics, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014) 2

The National Center for Employee Ownership, A Statistical Profile of Employee Ownership, http://www.nceo.org/main/article.php/id/2/ (last visited Feb. 1, 2014) 2

The National Center for Employee Ownership, Data Show Widespread Employee Ownership in U.S., http://www.nceo.org/articles/widespread-employee-ownership-us (last visited Feb. 1, 2014) 2

The National Center for Employee Ownership, Research on Employee Ownership, Corporate Performance, and Employee Compensation, http://www.nceo.org/articles/research-employee-ownership-corporate-performance (last visited Feb. 2, 2014) 25

Virginia Smith, Director of Enforcement, Employee Benefits Security Administration, U.S. Department of Labor, Comments at American Society of Pension Professionals and Actuaries ("ASPPA") 2010 Los Angeles Benefits Conference 16

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BRIEF FOR *AMICUS CURIAE* THE ESOP ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1978, The ESOP Association is a national nonprofit organization of companies with employee stock ownership plans (ESOPs) and service providers with a professional commitment to employee ownership through ESOPs. An ESOP is an employee benefit plan that is designed to invest primarily in the

---

[1] The parties have filed with the Clerk of the Court blanket letters of consent to the filing of amicus briefs in support of any party. In fulfillment of the requirement of Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

securities of the sponsoring employer. Like most other employer-sponsored benefit plans, ESOPs are subject to regulation under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et. seq.* ("ERISA").

At the end of 2012, there were approximately 12,600 ERISA plans in the United States that provide employees a vehicle for owning their employer's securities. *See* The National Center for Employee Ownership, A Statistical Profile of Employee Ownership, http://www.nceo.org/main/article.php/id/2/ (last visited Feb. 1, 2014) (statistics for ESOP, stock bonus, profit sharing, and Section 401(k) plans that offer employer stock fund investments). These plans have assets of approximately $1.07 trillion. *Id.* Included in these totals are approximately 5,000 companies that are majority owned by the ESOP, with approximately 4,000 of those companies being 100-percent owned by the ESOP. *See* The ESOP Association, ESOP Statistics, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014). Roughly 97% of these companies are privately owned. *See id.* Data from the National Opinion Research Center's 2010 General Social Survey shows that 18.7 million American workers own stock in their employer through a 401(k) plan, ESOP, direct stock grant, or similar plan. *See* The National Center for Employee Ownership, Data Show Widespread Employee Ownership in U.S., http://www.nceo.org/articles/widespread-employee-ownership-us (last visited Feb. 1, 2014). That means that 17.4% of the total private workforce, but 36.0% of those who work for companies that have stock, own the stock of their employer through some kind of benefit plan. *See id.*

The ESOP Association represents approximately 2,500 companies with ESOPs, companies considering implementing an ESOP, and service providers with a commitment to ESOPs. *See* The ESOP Association, ESOP Fact Sheet, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014). The ESOP Association participates in as *amicus curiae* in cases like this one, where there is a potential for far reaching effects on ESOP administration, creation or design.

SUMMARY OF ARGUMENT

1. Under the *Moench* presumption that the circuit courts apply in ERISA stock drop cases, an ESOP fiduciary's decision to acquire or hold employer stock is presumed to be prudent, reviewable only for an abuse of discretion. The Government has long opposed the *Moench* presumption, arguing without success that it is inconsistent with ERISA's standard of investment prudence, which the Government contends applies the same way to ESOP fiduciaries as it does to traditional pension plan fiduciaries. ESOPs are undiversified stock bonus plans that are written and statutorily authorized to be invested primarily in the stock of the plan's sponsor. ERISA's prudent man rule requires fiduciaries of employee benefit plans to follow the terms of the plan as written except to the extent inconsistent with ERISA. It also requires them to diversify plan investments so as to avoid the risk of large losses, except that fiduciaries of ESOPs are specifically exempted from this duty. The prudent man rule also requires fiduciaries to discharge their other plan duties prudently.

The Government argues that ERISA's diversification exemption merely absolves ESOP fiduciaries from the duty to reduce risk by spreading

plan assets among multiple prudent investments. It does not permit ESOP fiduciaries to concentrate plan assets in an "imprudent investment." Therefore, according to the Government, neither an ESOP fiduciary's duty to follow the plan document nor his exemption from the diversification requirement trump the duty to invest prudently; the ESOP fiduciary's investment decisions, including any decision to hold employer stock in the face of a drop in share price, should be reviewed *de novo* for prudence, not for an abuse of discretion. The Government's theory is that, notwithstanding the inherent imprudence of investing solely in a high-risk asset like a single issue of stock (which ERISA authorizes and encourages for ESOPs), ESOP fiduciaries have a duty to monitor the stock's volatility and intervene if it crosses some (unspecified) threshold of greater risk.

The Court should reject the Government's approach. It is premised on a distorted view of investment prudence that fails to realistically account for the central role that diversification plays in prudent investment. It is unrealistic about how infinitesimal the space is that ESOP fiduciaries must occupy between an undiversified ESOP portfolio invested in the common stock of a single issuer that, leaving aside its statutorily authorized lack of diversification, is "prudent" (*i.e.*, very risky but not *too* risky) and an undiversified ESOP portfolio invested in common stock that, apart from its lack of diversification, is "*im*prudent" (just too risky). When the stock price changes, entrepreneurial plaintiffs' lawyers do not care which side of this "razor's edge" the fiduciary's judgment falls on. In the Sixth Circuit and under the Government's approach, they are given the cudgel of a trial either way – if the share price

drops, they sue for waiting too long to act; if the share price recovers and rises, they sue for selling too soon.

The Court should hold that, as a matter of law, ERISA's duty of investment prudence does not require ESOP fiduciaries to act in response to price swings of the publicly traded employer stock held by the plan. The standards by which judgments are to be made in these cases are much too nebulous to serve as the basis for imposing liability on fiduciaries for a "wrong" decision. If the Court declines to so rule, it should adopt the "robust" *Moench* presumption advocated by Petitioners.

2. The Government suggests that ESOP fiduciaries with inside information that the employer's stock is "artificially inflated" have a duty to publicly disclose the information to protect participants from overpaying. The Court should reject this suggestion. In the typical case, the share price of the stock would immediately be adjusted downward by the market to account for the new information, causing the air in the stock to instantly escape. Participants would not be helped.

The Government appears to agree that ESOP fiduciaries have no duty to use material nonpublic inside information to sell "artificially inflated" stock for the benefit of ESOP participants, but Respondents do not agree. The Court should make clear that the duty of prudence governing ESOP fiduciaries does not require them to engage in insider trading in violation of the securities laws.

3. Congress has repeatedly and emphatically endorsed ESOPs because they have a long and rich history of providing the benefits of employee ownership to workers. ESOPs date back to at least

1953, when the first favorable Internal Revenue Service ruling was issued allowing corporations to use stock bonus plans to borrow money for investments in company stock. In the two decades after ERISA's enactment, Congress passed some twenty-five bills promoting and elaborating upon its express policy to encourage employees' ownership of their employer company and the formation of ESOPs. ESOPs serve a variety of purposes in the corporate context. Their primary purpose is not to serve as a retirement vehicle but as an incentive for corporations to structure their financing in such a way that employees can gain an ownership stake in the company for which they work.

ESOPs play a significant role in increasing the total compensation and retirement contributions for employees of companies who sponsor them. Companies sponsoring ESOPs compensate their employees approximately 4.5% more than companies without ESOPs, and companies sponsoring ESOPs provide more employee benefits than non-ESOP companies, with approximately 56 percent of companies sponsoring ESOPs offering a separate retirement savings or defined contribution plan. ESOP-sponsoring companies contribute as much as 75 percent more to their ESOPs than what non-ESOP companies contribute to their primary retirement plans. Companies sponsoring ESOPs also realize advantages in employee productivity and corporate performance. For example, the turnover rate of workers with employee stock ownership is significantly lower than that of employees without employee stock ownership.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THE DUTY OF INVESTMENT PRUDENCE DOES NOT REQUIRE ESOP FIDUCIARIES TO ACT IN RESPONSE TO PRICE SWINGS OF PUBLICLY TRADED EMPLOYER STOCK.

After the Private Securities Litigation Reform Act was passed in 1995 setting heightened pleading requirements for securities cases, ERISA "stock drop" suits rose significantly, in important part due to the attraction of ERISA's lesser pleading standards.[2] At the center of many of these cases, including this one, is whether the fiduciary of an ESOP[3] – which by design

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[2] M. Norman Goldberger, *Responding to Enforcement and Disclosure Requirements in the Securities Law Realm*, Aspatore, October 2011, *available at* 2011 WL 5053667, at *5; *see* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?*, 26 Hofstra Lab. & Emp. L.J. 497, 536-37 (2009) (discussing various procedural and remedial differences that make it less burdensome to proceed with an ERISA fiduciary breach claim based on the same underlying misrepresentations or nondisclosures as a securities class action).

[3] An ESOP is a tax-qualified stock bonus plan "designed to invest primarily in qualifying employer securities." 29 U.S.C. § 1107(d)(6). ESOPs are among the types of plans that fall within the definition of an "eligible individual account plan," which is defined as an "individual account plan which is: (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on the date of enactment of this Act and which on such date invested primarily in qualifying employer securities." To be treated as an eligible individual account plan (under the diversification exemption set forth in 29 U.S.C. § 1104(a)(1)(C), for example) with respect to the acquisition or holding of qualifying employer securities, the plan document must

invests primarily in employer stock – acted prudently before or after a change (usually a drop) in the price of the stock. Plaintiffs in these cases argue that the fiduciary's acquisition or holding of the stock at the time of the change exposed plan participants to "excessive risk" or resulted in their overpaying for "artificially inflated" stock.

Since 1995, the courts of appeals have developed the *Moench* presumption to guide judicial review of fiduciary investment decisions in these cases. *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Under the *Moench* presumption, an ESOP fiduciary who acquires or holds employer stock in accordance with the terms of the plan is presumed to have acted consistently with ERISA, and his investment decisions are reviewed only for an abuse of discretion. *Id.* at 571. Applied at the pleading stage by all circuits to have decided the issue except the Sixth,[4] the presumption can be overcome by pleading and establishing that "owing to circumstances not known to the settlor and not anticipated by him [the continued investment in employer stock] would defeat or substantially impair the accomplishment of the purposes of the trust." *Moench*, 62 F.3d at 571. "[T]he court must be governed by the intent of the trust – in other words, the plaintiff must show that the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's

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"explicitly provide[] for acquisition and holding of qualifying employer securities."

[4] *See Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2013); *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 990-91 (7th Cir. 2013); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 139 (2d Cir. 2011); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007).

expectations of how a prudent trustee would operate." *Id.* This has been refined to require a showing that the employer was in an unforeseen "dire situation," or that there were circumstances "clearly implicat[ing] the company's viability as an ongoing concern" which required the fiduciary to override the plan's terms. *Kopp*, 722 F.3d at 339 ("viability of the company"); *In re Citigroup ERISA Litig.*, 662 F.3d at 140 ("dire situation"); *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 882 (2010) ("company's viability as an ongoing concern"); *Edgar*, 503 F.3d at 348 ("dire situation").

The Sixth Circuit has adopted a presumption of prudence, but to overcome it plaintiffs need only show "that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *See Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 419 (6th Cir. 2012); *Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 592-93 (6th Cir. 2012). Under the Sixth Circuit's standard, which does not apply at the pleading stage, the ESOP fiduciary can be dragged into court and forced to defend himself for doing what the ESOP was designed and sanctioned under ERISA to do, even when reasonable fiduciaries are split as to whether the fiduciary's decisions were reasonable. *Kopp*, 722 F.3d at 337-39; *White*, 714 F.3d at 987.

The Government rejects the *Moench* presumption in any form and has filed briefs opposing it in every circuit where it has been at issue. U.S. Cert. Brief at 8 (arguing against any form of presumption of prudence); Brief of Secretary of Labor as Amicus Curiae in Support of the Plaintiff-Appellant at 16, Kopp v. Klein, No. 12-10416 (5th Cir. Aug. 15, 2012). The Government argues that ERISA imposes a unitary standard of investment prudence on all

fiduciaries, regardless of the nature of the plan at issue. U.S. Cert. Brief at 11. As a result, notwithstanding ERISA's express authorization for employers to write plans that "provide[] for acquisition and holding of qualifying employer securities,"[5] removal of the usual 10% limitation on holding qualifying employer securities,[6] permission for the ESOP to borrow funds from the employer or other specified insiders to acquire employer securities,[7] and exemption of ESOP fiduciaries from the duty to diversify plan assets,[8] the Government argues that the decisions of ESOP fiduciaries in connection with the acquisition or holding of employer stock are subject to the same standard of review as fiduciaries of traditional retirement plans. *Id.*

The Government's position is deeply flawed. As explained below, the Government's approach rests on a theoretical view of ERISA's prudent man rule that is not realistic about the circumstances these fiduciaries face. If adopted, it would entitle plaintiffs to expensive discovery and a trial any time the stock issued by the ESOP sponsor dropped significantly or the ESOP sponsor's business model arguably was "too risky." The Court should reject it and instead hold as a matter of law that the duty of investment prudence applicable to ESOP fiduciaries does not require them to act in response to changes in the trading price of qualifying employer securities held by the plan.

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[5] 29 U.S.C. § 1107(d)(3).

[6] 29 U.S.C. § 1107(a), (b).

[7] 29 U.S.C. § 1108(b)(3).

[8] 29 U.S.C. § 1104(a)(1)(C).

A. The Government Trivializes ERISA's Asset Diversification Exemption for ESOP Fiduciaries.

The Government argues that ERISA sets forth "the same general standard" of investment prudence for fiduciaries of ESOPs as it does for fiduciaries of retirement plans. U.S. Cert. Br. at 11. ERISA's diversification exemption, the government argues, "merely absolves [ESOP] fiduciaries" from the duty "to reduce risk by spreading plan assets among multiple prudent investments. It does not permit [ESOP fiduciaries] to concentrate plan assets in an *imprudent* investment." *Id.*

This is a serious distortion of ERISA's prudent man rule that leaves on the cutting room floor virtually everything about the role that diversification ordinarily plays in investment prudence. One cannot understand what is left of the duty to invest prudently after diversification's removal unless one first understands diversification's role.

Diversification is preeminent and indispensible for managing plan investment risk. Under ERISA's "prudent man standard of care," a fiduciary must discharge his duties with respect to a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Fiduciaries of typical retirement plans must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so," *id.* § 1104(a)(1)(C), but ESOP fiduciaries are exempt from the diversification requirement: "in the case of an

eligible individual account plan,[9] the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by the acquisition or holding of" qualifying employer securities. *Id.* § 1104(a)(2).

ERISA's fiduciary standards are borrowed and adapted from the common law of trusts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Under trust law (and ERISA), diversification is central to prudent investment and the management of risk. *See* Restatement (Third) of Trusts § 227 cmts. e & g; Uniform Prudent Investor Act § 3; George Gleason Bogert et al., *The Law of Trusts & Trustees* § 612 (3d ed. 2000); Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* at 16, 208-09. Understanding this background of diversification is important to understanding diversification's importance to ERISA's duty of prudence.

The duty to diversify originates from the duty to exercise caution in investing. The fiduciary is obligated to keep an eye on both safety of capital and reasonableness of return. Restatement (Third) of Trusts § 227 cmt. e. Return is directly correlated to risk, and all investment, including even in U.S. Treasuries, involves some risk. *Id.* Trustees have a duty to manage risk prudently in light of the short- and long-term needs of the trust. *Id.*

Risk is either diversifiable (which is uncompensated) or nondiversifiable (which is compensated, e.g., through market pricing). *Id.* Diversifiable risks are those that are unique to the

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[9] Eligible individual account plans include ESOPs. 29 U.S.C. § 1107(d)(3), (6).

issuer of the security and include such things as poor earnings, a labor strike, mismanagement, and business failure. *See, e.g.*, Bogert, Law of Trusts & Trustees § 612; Longstreth, Modern Investment Management and the Prudent Man Rule 82. These are the types of risks that can lead to a drop in share price and that are at work in many ERISA stock drop cases. Trustees have a duty to minimize or reduce diversifiable risks. Restatement (Third) of Trusts § 227 cmt. e. As a result, diversification is fundamental to the management of risk, regardless of what level of risk is appropriate to the trust. *Id.* § 227 cmts. e & g.

The Government's contention that the diversification exemption for ESOPs is not authority for fiduciaries to "concentrate plan assets in an imprudent investment" rests on a theoretical understanding of prudence that neglects to account for the enormity of diversification's role. In a portfolio, specific investments are not *per se* prudent or imprudent. The prudence of an investment turns on the appropriateness of its volatility for the portfolio as a whole. Restatement (Third) of Trusts § 227 cmt. f. Common stocks are inherently speculative (to an extent) and among the riskiest investments. *See* Benjamin Graham, The Intelligent Investor 18-34 (rev. ed. 1984). In a diversified portfolio that maintains some investments in stocks, the risk of these investments is managed by spreading the trust's investments in common stocks across multiple issuers and by investing other plan assets in different classes of assets with different risk profiles. *Id.*; Restatement (Third) of Trusts § 227 cmts. g & h. In general terms, this is what it means to diversify an investment portfolio.

By statutory design, an ESOP's investment portfolio is *un*diversified, consisting entirely or almost entirely of one security – stock of the employer. If a retirement plan were likewise invested solely in a single issue of common stock, selected only because it was the employer's common stock, it would always be "imprudently" invested, because the risk inherent in nondiversification would be too great and the selection criteria for the stock's inclusion inadequate. ERISA's exception to the duty to diversify exists to accommodate ESOPs and allow their fiduciaries to follow the plan's terms without violating the law.

B. The Government's Approach Is Unworkable.

The Government and plaintiffs in ERISA stock drop cases contend that, notwithstanding the inherent imprudence of investing solely in a high-risk asset like a single issue of stock (which the statute allows), ESOP fiduciaries have a duty to monitor the stock's volatility and intervene if it crosses some (unspecified) threshold of greater risk. The Court should reject this unworkable formulation of the duty of prudence. Instead, it should either recognize that ERISA's duty of prudence does not impose an obligation on the part of an ESOP fiduciary to act in response to changes in price of the publicly traded employer stock held by the plan, or adopt the "robust" *Moench* presumption advocated by Petitioners.

First, the Government's approach ignores the character of ESOPs and the nature of the risk that the statute necessarily anticipates and authorizes for them. It ignores the critical fact that the risks at issue in most of the ERISA stock drop cases are diversifiable risks that the fiduciary was excused from having to diversify in the first place. It ignores that the duty to

diversify exists in important part precisely because of the virtual impossibility of reliably making ultrafine judgments about the likelihood of a stock's future course and the excessive costs of trying to do so. Restatement (Third) of Trusts § 227 cmt. f. *See* Longstreth, Modern Investment Management and the Prudent Man Rule 81-85.

Second, it assumes that the duty to monitor and replace securities that have become excessively risky works the same way for an undiversified portfolio as it does for a regular diversified portfolio. It does not. In a diversified portfolio, the consequence of such a change is small and does not affect the character of the portfolio. Judgments are rough and relatively inexpensive. But in an ESOP portfolio, the change is hugely consequential. It alters the character of the ESOP. It requires the fiduciary to perform the impossible job of finding and then occupying the infinitesimal space that theoretically lies between an undiversified portfolio invested in common stock which, apart from its lack of diversification, is "prudent" (*i.e.,* very risky but not *too* risky) and an undiversified portfolio invested in common stock that, apart from its lack of diversification, is "*im*prudent" (just too risky). *See, e.g., White,* 714 F.3d at 987 (describing this space as "razor's edge"). Entrepreneurial plaintiffs' lawyers do not much care which way the fiduciary's judgment falls. In the Sixth Circuit and under the Government's approach, they get the cudgel of a trial either way – if the share price drops, they sue for waiting too long to act; if the share price recovers and rises, they get to sue for selling too soon. *See Rinehart v. Akers,* 722 F.3d 137, 140-41 (2d Cir. 2013) (drop); *Bunch v. W.R. Grace,* 555 F.3d 1, 2-3 (1st Cir. 2009) (rise). These are the ingredients that propel big-dollar settlements and, if effectively baked

into every case by adoption of the Government's proposed rule, almost surely would lead to the demise of ESOPs. That may be what the government has in mind,[10] notwithstanding the favored treatment Congress has afforded ESOPs.[11]

Third, even the standards adopted in the robust presumption circuits, while better, do not bring great clarity in cases where the company's drama is high enough to approach the threshold for rebutting the presumption. For example, identifying when the circumstances "clearly implicate the company's viability as an ongoing concern," or when the situation is sufficiently "dire," so as to require the fiduciary to

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[10] *See, e.g.*, Virginia Smith, Director of Enforcement, Employee Benefits Security Administration, U.S. Department of Labor, Comments at American Society of Pension Professionals and Actuaries ("ASPPA") 2010 Los Angeles Benefits Conference ("A second national enforcement project that we've had for a couple of years now is Employee Stock Ownership plans. . . . This is an area that is rife with problems from our perspective. I suppose there's some good ones out there. If anybody knows of any let me know. I've yet to find one."); *id.*, Comments at ASPPA 2011 Los Angeles Benefits Conference ("I have never seen a good ESOP.").

[11] *See, e.g.*, Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h) ("The Congress, in a series of laws . . . has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trust and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans...").

override the plan's terms is not clear. How dire do circumstances have to be? If the plan provides for maintenance of the investment "no matter how dire the circumstances," that would seem to remove the decision from challenge altogether. But the Government argues that ERISA's prudence standards trump inconsistent plan terms, *see* 29 U.S.C. § 1104(a)(1)(D), a proposition with which even the most vigorous presumption of prudence circuits do not seem to disagree. *E.g., White,* 714 F.3d at 997. That brings us back to trying to determine where the line of ERISA prudence falls and the seeming impossibility of doing so.

These points together, and the bar's experience with more than 19 years of litigating these cases, counsel toward recognizing that ERISA's duty of investment prudence does not require ESOP fiduciaries to act in response to price swings of the publicly traded employer stock held by the plan. The standards by which judgments are to be made in these cases are much too nebulous to serve as the basis for imposing liability on fiduciaries for "wrong" decisions. Recognizing the inappropriateness of imposing a duty to act in these cases is also compelled by the structure of the statute, which not only gives license for these unusual plans, but also ensures that participants have freedom to move their contributions in and out of employer stock funds (such as the Fifth Third stock fund) whenever the stock's volatility exceeds the participant's risk threshold. *See* 29 U.S.C. § 1054(j) (requiring that participants be permitted to freely transfer their own contributions out of employer stock fund and move employer contributions freely after three years of service); *White,* 714 F.3d at 993-94.

It is not as if the risk of loss or even bankruptcy is not contemplated and accepted by the ESOP rules. For ESOPs holding shares of nonpublicly traded companies, there generally is no market for the shares. If conditions deteriorate at the plan sponsor, there generally is no market for the employer shares held by the ESOP. That is one of the risks of ownership that the statute does not attempt to mitigate. Even assuming the ESOP's fiduciary could find a buyer for the stock, she will be sitting on the same "razor's edge" as the ESOP holding publicly traded employer securities.

II. THE COURT SHOULD MAKE CLEAR THAT THE DUTY OF INVESTMENT PRUDENCE FOR ESOPS HOLDING PUBLICLY TRADED SHARES DOES NOT REQUIRE VIOLATION OF THE SECURITIES LAWS.

The Court should make clear that the duty of prudence governing ESOP fiduciaries does not require violation of the securities laws.

The Government appears to agree that ESOP fiduciaries have no duty to use material nonpublic inside information to sell "artificially inflated" stock for the benefit of ESOP participants, U.S. Cert. Br. at 12, but Respondents do not agree. There should be little doubt that ERISA does not require fiduciaries to violate securities laws by engaging in insider trading, and the Court should expressly so hold. *Rinehart v. Akers*, 722 F.3d 137, 147 (2d Cir. 2013); *Kopp*, 722 F.3d at 339-40.

The Government suggests that ESOP fiduciaries with inside information indicating that the employer's stock is "artificially inflated" may have a duty to publicly disclose the information to protect

participants from overpaying. U.S. Cert. Br. at 12 (citing *Kopp*, 722 F.3d at 340 and *Harris v. Amgen, Inc.*, 738 F.3d 1026, 1041-42 (9th Cir. 2013). But in the typical case, the share price of the stock would immediately be adjusted downward by the market to account for the new information, and the air in the stock would immediately escape. The government does not explain how this would help participants.

The cases cited by the Government appear to be of no or little help. *Kopp* expressly declined to find that ERISA's prudence rule imposed a general duty to disclose all adverse inside information to the public, holding that "it is not the province of the courts to create such a duty out of whole cloth," and citing a Seventh Circuit decision that also declined to find a duty to disclose corporate well-being out of concern not to "disturb[] the carefully delineated corporate disclosure laws"). *Id.* (citing, *inter alia*, *Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004)). Fifth Circuit cases recognizing a duty of disclosure have been limited to situations where participants requested copies of plan documents in connection with their claims for benefits. *Id.* (citing *Kujanek v. Houston Poly Bag I, Ltd.*, 658 F.3d 483, 488 (5th Cir. 2011)). Other cases have reached the same result. *In re Citigroup ERISA Litig.*, 662 F.3d at 144-45; *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284-85 (11th Cir. 2012); *Edgar*, 503 F.3d at 350 (discussing unhelpful economic consequences that disclosing such information would have).

The Ninth Circuit in *Harris v. Amgen* found that there was a duty to disclose, but grounded that duty in the fact that ERISA fiduciary defendants were the same individuals who allegedly violated securities laws by making misleading statements. The court

reasoned that, because the defendants had a duty under the securities laws to correct their misstatements, separately requiring them under ERISA to make the same corrective disclosures would not have caused them to violate any securities laws. Had defendants made such disclosures promptly, the share price would not have been significantly inflated. *Harris v. Amgen*, 738 F.3d at 1041-42.

III. ESOPS HAVE BEEN FAVORED UNDER THE LAW SINCE 1953 AND HAVE BEEN PROVIDING SOCIETAL BENEFITS EVER SINCE.

Congress has repeatedly and emphatically endorsed ESOPs for a reason – their long and rich history of providing the benefits of employee ownership to workers.

A. A Brief History of ESOPS.

In 1953, the Internal Revenue Service published a ruling for the first time allowing corporations to use stock bonus or profit-sharing plans to borrow money for investments in company stock. *See* Elana Ruth Hollo, *The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy*, 23 Rutgers L.J. 561, 563 n.9 (1992). This ruling permitted "a key element of ESOPs, leveraging, which allows employees to purchase stock in their own company without putting up any of their own capital." *Id.* Following this ruling, in 1954 San Francisco lawyer and economist Louis O. Kelso established the first equivalent of an ESOP at Peninsula Newspapers, Inc. *See* Dana M. Muir, *The U.S. Culture of Employee Ownership and 401(k) Plans*, 14 Elder L.J. 1, 6 (2006); Steven J. Arsenault, *Aesop and the ESOP: A New*

Fable About Dividends and Redemptions, 31 Va. Tax Review 545, 548 n.9 (2012). Kelso would go on to become a strong advocate for the formation of ESOPs, arguing for broad-based employee stock ownership as one way to create a more vibrant capitalist system. *See* Louis O. Kelso & Mortimer J. Adler, *The Capitalist Manifesto* 169-70 (1958).

In 1973, Kelso met with Senator Russell Long (D-LA), then Chairman of the Senate Finance Committee, to discuss the benefits of employee stock ownership. *See* Corey M. Rosen et al., Employee Ownership in America 15 (1986). The day after this meeting, Senator Long inserted the first Congressional endorsement of ESOPs into the Regional Railroad Reorganization Act of 1973. *See id.* at 60-61; Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, §§ 102(5), 301(e), 87 Stat. 985, 987, 1005 (1974) (sponsoring a study of employee ownership of the new national rail system, Conrail). Senator Long would become "a champion of ESOP legislation, leading hearings and speaking fervently on its behalf whenever the opportunity arose." Hollo, *supra*, 23 Rutgers L.J. at 564.

The following year, recognition of ESOPs as a favored form of stock bonus plan in ERISA was a watershed event that led to the proliferation of employee stock ownership plans throughout the country. *See* Michel E. Murphy, *The ESOP at Thirty: A Democratic Perspective*, 41 Willamette L. Rev. 655, 656 (2005). "A number of divergent interest groups acted together to create the 'broad bipartisan support' needed to secure the inclusion of ESOP provisions in ERISA. Political conservatives who viewed ESOPs as a means to strengthen the free-market system, as well as those concerned with growing economic inequality

and its implications for democracy, supported the ESOP plan. ESOPs were also supported by those concerned with the lack of investment in, and the de-industrialization of, the U.S. economy, along with those who supported worker ownership for ideological reasons." Hollo, *supra*, 23 Rutgers L.J. at 566. In drafting and adopting the ESOP provisions of ERISA, Congress expressly intended to encourage employees' ownership of their employer company and the formation of ESOPs. *See Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983); *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995); H.R. Rep. No. 92-1280, at 58 (1974) (Conference Report) 1974 U.S.C.C.A.N. 5038, 5097 ("Any diversification principle that may develop in the application of the prudent man rule is not to restrict investments by [ESOPs] in qualifying employer securities.").

Over the next two decades, Congress passed some twenty-five bills promoting and elaborating upon its express policy to encourage employees' ownership of their employer company and the formation of ESOPs. *See* Jeff Gates, The Ownership Solution, Toward a Shared Capitalism for the Twenty-First Century 53 (1998). *See also, e.g.,* Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975) (providing ESOPs with corporate tax credit); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1590 (1976) (increasing allowable tax deductions for ESOP contributions); Economic Recovery Tax Act, Pub. L. No. 97-34, 95 Stat. 172 (1981) (making interest paid on loans from ESOP fully deductible); Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (providing tax incentives for lenders making loans to ESOPs and tax deductions for dividends passed through to ESOP participants); Small Business Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (permitting S

corporation shareholders to participate in ESOPs); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (expanding provisions allowing deductions for dividends paid on reinvested ESOP stock); American Job Creations Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (permitting S corporations to use distributions on stock held by plan to repay loans used to acquire stock).

Today, ESOPs serve a variety of purposes in the corporate context. "The ESOP's primary purpose . . . is not to serve as a retirement vehicle but, rather, to serve as an incentive for corporations to structure their financing in such a way that employees can gain an ownership stake in the company for which they work." 129 Cong. Rec. S16, 637 (daily ed. Nov. 17, 1983) (statement of Sen. Long).

B. The Benefits of ESOPS.

ESOPs play a significant role in increasing the total compensation and retirement contributions for employees of companies who sponsor them. According a 2008 study by E. Han Kim of the University of Michigan and Page Ouiment of the University of California, companies sponsoring ESOPs compensate their employees approximately 4.5% more than companies without. *See* Corey Rosen, *Employee Ownership and Corporate Performance A Review of Research on U.S. Companies,* at 22, 27 (2011*), availa ble* at http://www.nceo.org/Employee-Ownership-Corporate-Performance/pub.php/id/50/. A 2010 study funded by the Employee Ownership Foundation and based on data from the U.S. Department of Labor's Form 5500, which all companies with ERISA plans must file, found that companies sponsoring ESOPs provide more employee benefits than non-ESOP

companies, with approximately 56 percent of companies sponsoring ESOPs offering a second retirement savings or defined contribution plan. *See* The ESOP Association, Employee Ownership & Corporate Performance, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014). The same study reported that ESOP-sponsoring companies contributed 75 percent more to their ESOPs than what non-ESOP companies contributed to their primary retirement plans. *Id.* In fact, the average company sponsoring an ESOP contributed $4,443 per year to their primary retirement plan on behalf of each active participant, whereas the average non-ESOP company with a defined contribution plan contributed an estimated $2,533 per active participant. *Id.*

Companies sponsoring ESOPs also realize advantages in employee productivity and corporate performance. For example, the turnover rate of workers with employee stock ownership is significantly lower than that of employees without employee stock ownership. *See* The ESOP Association, Employee Ownership & Corporate Performance, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 1, 2014) (figures as of 2010). Data from the 2010 General Social Survey showed that 13% of the employees with employee stock ownership intended to leave their companies in the coming months, as compared to a rate of 24% of employees without employee stock ownership. *Id.* In addition to greater employee retention, employee ownership of his or her employer's stock results in increased job satisfaction as well as increased corporate productivity and profitability. *See* Steven F. Freeman, *Effects of ESOP Adoption and Employ*

Ownership: Thirty Years of Research and Experience, at 7 (January 4, 2007), *available at* http://repository.upenn.edu/od_working_papers/2/. In closely held companies, adoption of an ESOP also tends to increase overall sales, number of employees, and sales per employee by about 2.3 to 2.4 percent annually over what would be expected if no ESOP were in place. *See* The National Center for Employee Ownership, Research on Employee Ownership, Corporate Performance, and Employee Compensation, http://www.nceo.org/articles/research-employee-ownership-corporate-performance (last visited Feb. 2, 2014). Taken on their own, these differentials might appear insubstantial. Projected over ten years, however, a company sponsoring and ESOP is estimated to be one-third larger than its non-ESOP counterpart. *See* Corey Rosen, *The State of the Broad-Based Employee Ownership Plans*, at 12 (2013), *available at* http://www.nceo.org/State-Employee-Ownership-ebook/pub.php/id/275/. Finally, companies sponsoring ESOPs enjoy greater longevity than non-ESOP companies and are substantially more likely than their competitors to be in business several years later. *Id.* at 11.

Adoption of ESOPs even saved the federal government money during the Great Recession. Using data from the 2010 General Social Survey, an analysis by the National Center for Employee Ownership showed that employee stock owned companies laid off employees at a rate of 2.6% in 2010, whereas the rate for conventionally-owned companies was 12.1%. *See* The ESOP Association, Employee Ownership & Corporate Performance, http://www.esopassociation.org/explore/employee-ownership-news/resources-for-reporters#statistics (last visited Feb. 2, 2014). The NCEO analysis calculates that 18 million Americans

worked for employee stock owned companies in 2010, with 11 million working in companies with ESOPs. *See id.* Savings to the federal government from the low layoff rate of ESOP participants was $13.7 billion in 2010, or almost 14 times the estimated $1 billion a year tax expenditure attributed to the special laws promoting ESOP creation and operation. *See id.*

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

LARRY GOLDBERG
LYNN DUBOIS
ESOP Law Group, LLP
Four Embarcadero Center
14th Floor
San Francisco, CA 94111
(415) 766-3512

CHARLES M. DYKE
Counsel of Record
SEAN T. STRAUSS
Trucker ✦ Huss
A Professional Corporation
One Embarcadero Center,
Suite 1200
San Francisco, CA 94111
(415) 788-3111
cdyke@truckerhuss.com

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,

Petitioners,

v.

JOHN DUDENHOEFFER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* KEYCORP IN SUPPORT OF PETITIONERS

DANIEL R. WARREN
Counsel of Record
SCOTT C. HOLBROOK
JAMES A. SLATER, JR.
DAVID A. CARNEY
BAKER & HOSTETLER LLP
PNC Center, Suite 3200
1900 East Ninth Street
Cleveland, Ohio 44114
dwarren@bakerlaw.com
(216) 621-0200

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF THE *AMICUS CURIAE*

KeyCorp respectfully submits this brief under Supreme Court Rule 37.3(a) as *amicus curiae* in support of petitioners on writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

KeyCorp is a bank holding company headquartered in Cleveland, Ohio. Approximately 30,000 employees and former employees of KeyCorp and its affiliate entities participate in the company's 401(k) retirement plan. Many of these individuals have chosen to invest a portion of their plan accounts in KeyCorp stock. Since 2008, several former employees have brought alleged class actions against KeyCorp and several of its senior officers based on ERISA theories like those asserted against petitioners here. *See Taylor v. KeyCorp, et al.*, No. 08-cv-1927 (N.D. Ohio, Aug. 11, 2008) (consolidated); *Metyk v. KeyCorp, et al.*, No. 10-cv-2112 (N.D. Ohio, Sept. 22, 2010) (same).

KeyCorp files this *amicus* brief because the Sixth Circuit—in direct conflict with the several other courts of appeals that have addressed these same

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[1] Petitioners and respondents have consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than KeyCorp made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

issues—has made it far too easy for plaintiffs to get a meritless claim under ERISA past a motion to dismiss. This Court should reject the Sixth Circuit's standard and adopt at the pleading stage a demanding presumption of prudence that will protect companies and their ESOP fiduciaries from wasteful and protracted litigation and give effect to ERISA's unambiguous exemption of ESOP fiduciaries from the duty to diversify company stock.

SUMMARY OF ARGUMENT

In the wake of the recent economic crisis, plaintiffs' class action attorneys filed scores of ERISA cases alleging companies and their plan fiduciaries breached their duties merely by providing participants with the option of investing in company stock. The plaintiffs in these ERISA "stock-drop" cases, with the benefit of hindsight, broadly challenge the companies' prior business practices that allegedly caused the stock-price decline. The resulting discovery always threatens to be wide-ranging and expensive. The potential liability is generally daunting as well. For large companies, company stock holdings in 401(k) plans can run into the hundreds of millions of dollars. If stock prices lose value, as happened to the majority of publicly traded companies during the recent economic crisis, these companies become a ready target for substantial class action litigation.

Recognizing that Congress's intent was to encourage employee ownership, not punish it, all but one of the courts of appeals to address the issue presume that an ESOP fiduciary's decision to allow

plan participants to invest in company stock is prudent (the so-called "*Moench* presumption") unless the plaintiff can plausibly allege the company was in dire circumstances. *See* Pet. Br. 22-23. These courts further hold this presumption should be applied at the motion-to-dismiss stage, so as not to require defendants to endure sprawling and wasteful litigation where the plaintiff's claims have no real chance of succeeding. *E.g.*, *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007).

The Sixth Circuit alone has charted a different course. While purporting to recognize the presumption, the court has refused to adopt a "dire circumstances" test or anything similar to it, instead opting for what it describes as an "unembellished standard" that allows plaintiffs to satisfy the presumption merely by establishing "a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12. Contrary to the other courts of appeals, the Sixth Circuit also has refused to apply even this watered-down standard, or any other version of the *Moench* presumption, on a motion to dismiss. *Id.* at 11-12.

Petitioners have already made a compelling case for rejecting the Sixth Circuit's standard in favor of a demanding presumption of prudence that adequately protects ESOP fiduciaries who allow plan participants to invest in company stock. *See* Pet. Br. at 25-30. *Amicus* KeyCorp respectfully submits an additional argument in support of a strong presumption that flows directly from Congress's

decision to exempt ESOP fiduciaries from the duty to diversify plan assets under ERISA. *See* 29 U.S.C. § 1104(a)(2).

Because ESOP fiduciaries have no duty to prevent participants from holding too much company stock, the real question in these cases is whether the fiduciaries breached their obligations by allowing plan participants to invest in "even one share" of it. *See Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 249 (5th Cir. 2008) (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) ("If there is no duty to diversify ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock.") (quotation omitted).

To prevail on such a claim, plaintiffs must assume an extreme proposition—that the company stock was such a bad investment the fiduciaries had no choice but to override the participants' decision to invest in it and prohibit those participants from buying any additional shares going forward. Pure logic dictates that a fiduciary should not have to take such drastic and risky action unless the company's circumstances are truly dire. Moreover, respondents' allegation that ESOP fiduciaries artificially inflated the stock by misrepresenting or concealing the company's financial condition is an improper end run around the strict pleading requirements Congress has

mandated for the same types of claims under the federal securities laws.

Respondents and the Government nonetheless urge this Court to embrace the Sixth Circuit's lax standard, and they downplay its dangerous consequences. The Government dismisses as "exaggerated" the notion that "ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates." U.S. Cert. Br. 12. This is nothing short of turning a blind eye to an obvious reality. KeyCorp and numerous other companies headquartered in this circuit, including petitioner Fifth Third (twice), Ford Motor Company, General Motors Corporation, Cardinal Health, Inc., The Goodyear Tire & Rubber Corporation, and Macy's, Inc. (and many others), all have been subjected to wasteful and expensive ERISA stock-drop class actions in recent years. In each case, defendants were sued for allowing participants to invest in company stock after its market price dropped. And in each case, defendants lost Rule 12(b)(6) motions to dismiss under the same kind of plaintiff-friendly standard of review the Sixth Circuit applied here. *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 889, 893 (E.D. Mich. 2008); *In re General Motors ERISA Litig.*, No. 05-71085, 2006 WL 897444, at *13 (E.D. Mich. Apr. 6, 2008); *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1032-33 (S.D. Ohio 2006); *In re The Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783, 793 (N.D. Ohio 2006); *Shanehchian v. Macy's, Inc.*, No. 07-cv-828, 2009 WL 2524562, at *6-7 (S.D. Ohio Aug. 14, 2009).

Defendants contending with the Sixth Circuit's standard thus face an unenviable dilemma, where they must either embark on costly, disruptive, and protracted litigation or pay dearly to settle meritless claims. Worse yet, to avoid liability under this standard should the Court adopt it going forward, ESOP fiduciaries will have to consider "playing" the market with ESOP funds by turning the company stock fund switch on and off every time they anticipate the price might be about to rise or fall. In the end, adopting the Sixth Circuit's standard will force companies to seriously contemplate whether to continue offering ESOPs at all. That result is at odds with Congress's decision to encourage employee ownership, not to mention the wishes of the many employees who choose to invest in their employer companies. Accordingly, this Court should reverse the judgment of the court of appeals.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE PRESUMPTION OF PRUDENCE IGNORES ERISA'S DIVERSIFICATION EXEMPTION FOR ESOP FIDUCIARIES.

A. As more fully explained in petitioners' brief, ERISA exempts ESOP fiduciaries from any duty to diversify. *See* Pet. Br. 6, 21 (citing 29 U.S.C. § 1104(a)(2)). The purpose of this exemption is plain: to protect ESOP fiduciaries from liability for doing precisely what Congress intended them to do—giving employees the option to invest their plan accounts in company stock. As the Ninth Circuit correctly recognized, "If there is no duty to diversify

ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock." *Wright*, 360 F.3d at 1097 (quotation omitted); *see also Kirschbaum*, 526 F.3d at 249 (dismissing claim that plan became "too heavily weighted" in company stock); *Lanfear*, 679 F.3d at 1278 ("ESOP fiduciaries are exempt from the duty to diversify; indeed, they have a duty not to diversify.").

Ordinarily, of course, "[d]iversification is fundamental to the management of risk," and thus "an essential element of prudent investing by a fiduciary." Restatement (Third) of Trusts § 227, cmt. f; *see also Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 406 (7th Cir. 2006) (same). A company stock fund, like any single-stock investment, is inherently a high-risk investment. In most circumstances that risk can be managed through proper diversification with other, more conservative investments. But once the ordinary duty to diversify is removed from the equation—as Congress has mandated in the ESOP context—the only question for the fiduciary is not whether there is too much company stock in the plan, but instead whether the particular stock is so unsafe that a participant should not be permitted to hold even a single share. *See Kirschbaum*, 526 F.3d at 249 (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 638-39 (N.D. Ohio 2009) ("Plaintiffs admit that their prudence claim is not that Defendants breached

their fiduciary duty by failing to diversify the Plan, but that they breached their fiduciary duty by permitting any participant to have the option of holding or investing in even one share of KeyCorp stock. . . .") (quotation omitted).

Accordingly, to prevail on such a claim, plaintiffs have to prove an extreme proposition—that the company stock had become such a bad investment that the plan fiduciaries had no choice but to override a plan participants' decision to invest in it and prohibit those participants from buying any additional shares going forward. Logically, this could only be the case where the company is facing dire circumstances. Recognizing the drastic nature of such a claim, all the federal courts of appeals to address the issue (except the Sixth Circuit) have held that ESOP fiduciaries cannot be held liable for continuing to invest plan assets in company stock except in the most dire of circumstances. *See* Pet. Br. 22-23.

The Sixth Circuit, however, rejected this approach in favor of a vague and indeterminate standard of liability—that plaintiffs must "prove that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12. The court justified its "unembellished standard" on the misguided view that ERISA imposes "identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13 (emphasis in original). But all fiduciaries are *not* identical under ERISA. To the contrary, ERISA exempts ESOP fiduciaries from the duty to diversify that is imposed on all other fiduciaries

under the ERISA legislative scheme. This Court should not adopt a standard that reads this critical exemption out of existence.

B. Respondents' contention that Fifth Third stock was "artificially inflated" does not change this analysis. As petitioners explained in detail in their brief, artificial inflation claims inherently arise from purported misrepresentations or omissions in securities filings, and it is the securities laws, not ERISA, that are designed to provide relief for this alleged misconduct. Pet. Br. 42-44. Indeed, although the Court did not accept this issue for review, most courts of appeals have held that misrepresentations or omissions in securities filings are purely corporate, as opposed to fiduciary, communications, and thus not actionable under ERISA. *See* Pet. 30-32. As this Court held in *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996), an employer does not act in a fiduciary capacity "simply because it ma[kes] statements about its expected financial condition or because an ordinary business decision had an adverse impact on the plan."

In truth, plaintiffs are hoping to make an end run around the strict limitations Congress has placed on alleged securities fraud claims under the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (Congress enacted PSLRA to prevent "nuisance filings, targeting of deep-pocket defendants, and manipulation by class action lawyers of the clients whom they purportedly represent") (quotation omitted); *see also* H.R. Conf.

Rep. No. 104-369, 1995 U.S.C.C.A.N. 730, 731 (1995) (PSLRA designed to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action").

Freeing ERISA plaintiffs from the exacting standards that would apply to substantively analogous claims under the PSLRA serves no good purpose. This is illustrated by respondents' self-defeating artificial inflation allegations here, where they proclaim that virtually all the information Fifth Third purportedly misrepresented or concealed regarding its subprime loan portfolio was well known to the market *before the class period even began*. J.A. 48-52, ¶¶ 83-95 ("Published Warnings Place Plan Fiduciaries On Notice of Need to Investigate Risks of Subprime Exposure."); Pet. App. 14 ("The Amended Complaint specifically enumerates and describes these warnings *and public information* of which the Defendants were aware.") (emphasis added). It is self-evident that "if investors already know the truth, false statements won't affect the price." *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) (quotation omitted); *see also Fulton Cnty. Emp. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1050 (7th Cir. 2012) ("In July 2007 the whole world knew that firms that had issued, packaged, or insured subprime loans were in distress. Nothing MGIC said, or didn't say, could conceal that fact."); *Metyk v. KeyCorp*, No. 10-cv-

2112, 2013 WL 331122, at *4 (N.D. Ohio Jan. 29, 2013) ("Plaintiffs admit that the alleged misrepresentations about accounting and tax problems involving the leveraged leases and high risk homebuilder loans were known to the market before the class period began.").

This Court should not give ERISA stock-drop plaintiffs a free pass to discovery based upon these types of defectively pleaded allegations of purported artificial inflation. Instead, by applying a rigorous presumption of prudence, this Court can maintain a distinct role under ERISA for alleged imprudent investment claims against ESOP fiduciaries without intruding upon the careful pleading and proof requirements Congress has mandated for these same types of claims in the securities fraud context. *See Kirschbaum*, 526 F.3d at 255-56 (applying *Moench* to all alleged imprudent investment claims because there is "no principled difference between how a fiduciary should respond to 'artificial inflation' of the stock price as opposed to other sorts of negative insider information"); *Wright v. Medtronic, Inc.*, No. 09-cv-443, 2010 WL 1027808, at *8 (D. Minn. Mar. 17, 2010) ("Allowing plaintiffs to evade the *Moench* presumption merely by pleading that the stock was artificially inflated for one reason or another would eviscerate the presumption.").

II. THE SIXTH CIRCUIT'S STANDARD THREATENS CONGRESS'S EMPLOYEE OWNERSHIP GOALS BY SUBJECTING ESOP FIDUCIARIES TO WASTEFUL AND MERITLESS LITIGATION.

A. The Government contends the Court's adoption of this or some similar standard of review will not lead to "expensive litigation and extensive discovery[.]" U.S. Cert. Br. 12. This does not accord with the reality facing public companies headquartered in the Sixth Circuit. At least seventeen different ERISA stock-drop defendants have lost motions to dismiss in this circuit, with some district courts refusing to apply the presumption on a motion to dismiss. *See In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 953-54 (W.D. Tenn. 2010); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 640 (N.D. Ohio 2009); *Sims v. First Horizon Nat'l Corp.*, No. 08-cv-2293, 2009 WL 3241689, at *24 (W.D. Tenn. Sept. 30, 2009); *Shanehchian*, 2009 WL 2524562, at *6-7; *Banks v. Healthways, Inc.*, No. 08-cv-734, 2009 WL 211137, at *2-3 (M.D. Tenn. Jan. 28, 2009); *In re Diebold ERISA Litig.*, No. 06-cv-170, 2008 WL 2225712, at *8-9 (N.D. Ohio May 28, 2008); *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d at 893, 913; *Shirk v. Fifth Third Bancorp*, No. 05-cv-49, 2007 WL 1100429, at *10 (S.D. Ohio Apr. 10, 2007); *In re Nortel Networks Corp. ERISA Litig.*, No. 03-md-1537, Mem. Op. & Ord., Doc. No. 95, at 8-9 (M.D. Tenn. Oct. 11, 2006); *In re Goodyear Tire & Rubber Co.*, 438 F. Supp. 2d at 793-94; *In re General Motors ERISA Litig.*, 2006 WL 897444, at *12-13; *In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d at

1033-34; *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 860-61 (N.D. Ohio 2006); *Sherrill v. Federal-Mogul Corp. Ret. Programs Comm.*, 413 F. Supp. 2d 842, 868 (E.D. Mich. 2006); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 828-29 (S.D. Ohio 2004); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 914 (E.D. Mich. 2004); *Rankin v. Rots*, 278 F. Supp. 2d 853, 878-79 (E.D. Mich. 2003).

By contrast, only five ERISA stock-drop defendants in this circuit have won motions to dismiss—and the Sixth Circuit has now reversed three of these decisions on appeal. *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2011 WL 1261196, at *14 (E.D. Mich. Mar. 31, 2011), *rev'd by* 492 Fed. Appx. 598, 604 (6th Cir. 2012); *Dudenhoeffer v. Fifth Third Bancorp*, 757 F. Supp. 2d 753, 762 (S.D. Ohio 2010), *rev'd by* 692 F.3d 410, 419-20 (6th Cir. 2012); *Pfeil v. State Street Bank & Trust Co.*, No. 09-cv-12229, 2010 WL 3937165, at *4-5 (E.D. Mich. Sept. 30, 2010), *rev'd by* 671 F.3d 585, 592 (6th Cir. 2012); *see also Benitez v. Humana, Inc.*, No. 08-cv-211, 2009 WL 3166651, at *7-8 (W.D. Ky. Sept. 30, 2009), *abrogated on other grounds by Dudenhoeffer*, 692 F.3d at 423; *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 852-53 (S.D. Ohio 2009).

It is not difficult with the benefit of hindsight to allege that a company whose stock price dropped during a general economic decline should have made different business decisions, or that ESOP fiduciaries should not have let plan participants invest in company stock as a result. The Sixth Circuit's lenient standard thus only encourages

plaintiffs to exploit ERISA's provisions to file Monday-morning-quarterback complaints filled with unrestrained second-guessing of business decisions whenever the company's stock price drops.

The cases bear this out. *E.g., In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d at 912-13 (alleging Ford stock was imprudent investment because of company's "failure to design and manufacture products that are competitive in the marketplace," and "to control Ford's liabilities and other obligations in respect of current and future retirees"); *Shanehchian*, 2009 WL 2524562, at *4, 7 (alleging Macy's stock was imprudent investment following company's $11 billion merger with May Department Stores because of "problems with the integration process," as well as "the overall health of the Company as a result of overstated sales").

The complaint against Fifth Third is no different. Here, respondents loosely allege a "variety of circumstances" contributed to the allegedly "unacceptable level of risk borne by Plan participants as a result of the Plan's investment in Fifth Third Stock." J.A. 54-55, ¶ 103. These include, but are not limited to, Fifth Third's alleged "overexposure to loans tied to the declining housing and construction market," alleged "exposure to subprime loans through its ill-timed acquisition of First Charter Corp.," alleged "failure to implement and maintain sufficient risk management control processes," and alleged "failure to properly account for and disclose its exposure to losses tied to its business operations in the subprime market." *Id.* In this one sweeping, conclusory allegation,

respondents have challenged the entirety of Fifth Third's residential and commercial mortgage lending policies, the prudence of a major corporate acquisition, the sufficiency of the bank's risk management controls, and the legitimacy of the bank's accounting practices and public disclosures to the market regarding these issues.

Contrary to the Government's contention, discovery on these kinds of wide-ranging claims would be massive, wasteful, and cost-prohibitive. A weak presumption of prudence that is not even applied on a motion to dismiss, coupled with far-reaching complaints that challenge substantial areas of a company's business activities, allow plaintiffs to exploit the coercive effect of unrestrained and costly discovery even when the litigation has no merit. As Chief Judge Jacobs correctly observed in *Kiobel v. Royal Dutch Petroleum Company*, 642 F.3d 268, 271 (2d Cir. 2011) (concurring in denial of panel rehearing): "[I]nvasive discovery . . . combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero."[2]

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[2] There have already been three settlements following the Sixth Circuit's decision. *In re Regions Morgan Keegan ERISA Litig.*, No. 08-cv-2192, No. 318 (W.D. Tenn., Dec. 18, 2013) (seeking approval of $14.5 million settlement); *Griffin v. Flagstar Bancorp, Inc.*, No 10-cv-10610, No. 54, Op. & Order (E.D. Mich., Dec. 12, 2013) (approving $3 million settlement); *Shanechian v. Macy's, Inc.*, No. 07-cv-828, No. 228, Op. & Order (S.D. Ohio, May 8, 2013) (approving $8.5 million settlement).

In the end, these cases lack merit. It is thus not surprising that of the only two ERISA stock-drop cases that have proceeded to final judgment in the Sixth Circuit, defendants have won both—and neither judgment was appealed. *Shirk v. Fifth Third Bancorp*, No. 05-cv-49, 2009 WL 692124, at *6, 13-14 (S.D. Ohio Jan. 29, 2009) (granting summary judgment where Fifth Third's closing price was higher at the end of the proposed class period than at the beginning); *Benitez v. Humana, Inc.*, 08-cv-211, 2009 WL 3166651, at *7 (W.D. Ky. Sept. 30, 2009) (dismissing ERISA stock-claim filed after 14 percent stock-price drop plaintiffs blamed on alleged "internal control problems" and "old software"). Of course, Fifth Third was promptly sued a second time—this time after a world-wide financial crisis that saw the stock price of many companies drop substantially—and is now before this Court.

The Government downplays the concerns of ERISA stock-drop defendants by arguing that "a plaintiff cannot state a claim [under ERISA] merely because the company or industry was suffering financial difficulties." U.S. Cert. Br. 12. But the experiences of *amicus* KeyCorp, petitioner Fifth Third, and other defendants in the Sixth Circuit prove just the opposite. Fifth Third, KeyCorp, and Huntington Bancshares—three Ohio banks all sued in ERISA stock-drop class actions—were not alone in suffering a sharp decline in the price of their stock during the recent economic crisis. In fact, as the following chart shows, the Ohio banks' stock closely tracked the ups and downs of other national banks during these economically troubled times:

Contrary to the Government's assurances, this chart makes clear that defendants are being sued not because of some unique act of imprudence committed by their ESOP fiduciaries, but instead because of industry-wide problems that affected a multitude of companies during the financial crisis.

B. Faced with the significant risk of litigation every time a company's stock price drops, ESOP fiduciaries will have to contemplate whether to "play" the stock market any time they fear the stock price might be headed for a fall. But as the Fifth and Ninth Circuits have correctly noted, "the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops." *Kirschbaum*, 526 F.3d at 254; *see also Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (same).

Moreover, liquidating company stock from an ESOP is fraught with jeopardy. Even if one ignores the fallacy that fiduciaries can predict future stock performance, such a substantial amount of stock could not be dumped on the market without causing a significant drop in its price, thereby harming all the company's shareholders—including the plan participants on whose behalf these cases are purportedly brought. As the Eighth Circuit has stated, it would be "fanciful" to believe ESOP fiduciaries could flood the market in this way "without creating a much more severe impact on stock price than the alleged impact [the company's] actual response caused." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (affirming grant of motion to dismiss stock-drop case).

Similarly, were ESOP fiduciaries to eliminate company stock as an investment option only on a going-forward basis, this too would be a "clarion call to the investment world that the [plan] Committee lacked confidence in the value of its stock," which would have a "catastrophic effect on [its] stock price." *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009), *aff'd by Quan*, 623 F.3d at 882-83.

Moreover, if fiduciaries forcibly liquidate an ESOP and the company's stock price then increases, they would "face liability for that caution." *See Edgar*, 340 F.3d at 349 (quotation omitted). Indeed, fiduciaries have been sued under ERISA for doing exactly that. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 3 (1st Cir. 2009) (fiduciaries sued for divesting company stock at "imprudently low price");

Tatum v. R.J. Reynolds Tobacco Co., 392 F.3d 636, 639 (4th Cir. 2004) (fiduciaries sued for liquidating employer stock fund from plan). The Fifth Circuit correctly concluded this puts ESOP fiduciaries in an "untenable position[.]" *Kirschbaum*, 526 F.3d at 256.

In truth, upholding the Sixth Circuit's standard would so fundamentally undermine the purpose of ESOPs, and place such an unfair and ill-defined burden on fiduciaries, that companies would seriously consider abandoning them altogether. *See* Pet. Br. 41 (Congress did not intend through ERISA to create a system "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.") (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)). The evidence bears this out. *See* Stephen P. Utkus & Jean A. Young, *The Evolution of Company Stock in Defined Contribution Plans* at 6 (Vanguard Research, Mar. 2012) (analyzing company stock fund closures taken to mitigate fiduciary and litigation risk).

A strong and protective standard—such as "dire circumstances" or "verge of collapse"—provides clear guidelines that allow ESOP fiduciaries to properly perform their role without constant risk of liability as company stock inevitably rises and falls over time. This standard appropriately recognizes ESOP fiduciaries' exemption from the duty to diversify, gives due recognition to Congressional intent favoring employee ownership, and protects the desires of participants who choose to invest in their companies' stock.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

DANIEL R. WARREN
Counsel of Record
SCOTT C. HOLBROOK
JAMES A. SLATER, JR.
DAVID A. CARNEY
BAKER & HOSTETLER LLP
PNC Center, Suite 3200
1900 East Ninth Street
Cleveland, Ohio 44114
(216) 621-0200
dwarren@bakerlaw.com

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FIFTH THIRD BANCORP, ET AL.,

Petitioners,

v.

JOHN DUDENHOEFFER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

DAVID PRATT
Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
518-445-2311

LYNN L. SARKO
Counsel of Record
ERIN M. RILEY
KELLER ROHRBACK L.L.P.
1201 Third Ave., Suite 3200
Seattle, WA 98101
206-623-1900
lsarko@kellerrohrback.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1602, 110 Stat. 1755 (1996) 12

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976) 9, 10, 11

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1171, 100 Stat. 2085 (1986) 12

Treas. Reg. § 1.401-1(a)(2)(ii), 21 Fed. Reg. 7276 (Sept. 25, 1956) 19

Uniform Prudent Investor Act § 3 (1994) 17

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OTHER AUTHORITIES

Andrew W. Stumpff, *Fifty Years of Utopia: A Half-Century After Louis Kelso's The Capitalist Manifesto, A Look Back at the Weird History of the ESOP*, 62 TAX LAW. 419 (2009) 12

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H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038 19

John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) 27

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John H. Langbein, Testimony to S. Comm. on Governmental Affairs, Jan. 24, 2002, *reprinted as* "What's Wrong with Employer Stock Pension Plans," in *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* 487 (Nancy B. Rapoport & Bala G. Dharan eds., 2d ed. 2009) 14

National Center for Employee Ownership, *A Statistical Profile of Employee Ownership* (Jan. 2012) 22

Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131 (2009) 9

Peter J. Wiedenbeck, *Trust Variation and ERISA's Misbegotten "Presumption of Prudence,"* forthcoming TAX NOTES (Mar. 2014) 11, 12, 25, 26

Restatement (Second) of Trusts (1959) 24, 28, 33

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INTEREST OF *AMICI CURIAE*

Amici curiae are legal scholars who write and teach about pension and employee benefits law.[1] One of their primary areas of concern is retirement income security under defined contribution plans where, unlike traditional defined benefit plans, (1) no particular level of benefits is promised and (2) the plan participants bear all the investment risk. They are particularly concerned about plans that invest assets in employer securities. The issues in this case are exceptionally important because they potentially affect the retirement income security of millions of plan participants. Unlike the situation in 1974, when ERISA was enacted, most plan participants now have only a defined contribution plan; they do not have a defined benefit plan to provide guaranteed retirement income.

Jonathan B. Forman is the Alfred P. Murrah Professor of Law at the University of Oklahoma College of Law.

David A. Pratt is a Professor of Law at Albany Law School.

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[1] The parties have filed with the Clerk of the Court blanket letters of consent to the filing of amicus briefs in support of any party. In fulfillment of the requirement of Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

Sharon Reece is a Visiting Associate Professor of Law at the University of Maryland Francis King Carey School of Law.

Paul M. Secunda is a Professor of Law at Marquette University Law School.

Susan J. Stabile is the Robert and Marion Short Distinguished Chair in Law and a Professor of Law at the University of St. Thomas School of Law.

Norman P. Stein is a Professor of Law at the Drexel University School of Law.

Peter Wiedenbeck is the Joseph H. Zumbalen Professor of the Law of Property at the Washington University School of Law.

Amici hope that their experience and expertise will assist the Court in its consideration of the important questions this case presents.

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, requires a plan fiduciary to

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with

> such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

This case concerns the application of that statutory requirement to fiduciaries of plans that invest in the sponsoring employer's securities.

In 1995, the Court of Appeals for the Third Circuit held that fiduciaries of ESOPs (employee stock ownership plans) are generally entitled to a presumption that investment in or retention of employer securities satisfies the ERISA standard of prudence (the "*Moench* presumption"). *See Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 26141 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Six other courts of appeals have adopted some permutation of the *Moench* presumption, but these courts are divided as to the strength of the presumption, the evidence required to overcome the presumption, and whether the presumption applies on a motion to dismiss.

The *Moench* presumption should not be applied to *any* stage of the proceedings, let alone to the pleading stage. The presumption is neither consistent with the statutory language nor necessary to resolve any perceived conflict between the central purpose of ERISA and encouragement of employee ownership. The presumption also undermines the primary goal of ERISA as outlined in Section 2 of the Act (29 U.S.C. § 1001): the protection of retirement plan participants

and beneficiaries. Additionally, the presumption ignores important differences between ERISA and private trust law.

Rather than being allowed a presumption of prudent investment, ERISA fiduciaries of defined contribution plans with employer stock should be subject to the standard found in the statute – the "Prudent Man" standard (also known as the "Prudent Person" standard). Although ERISA provides an exception for the inherent nondiversification risk associated with investment in employer stock, it provides no exception for the prudential concerns raised when the fiduciary should be aware that the *specific company's securities* raise a *specific investment risk* – which was the exact claim made by the Respondents in this case.

Defined contribution retirement plans cover millions of plan participants and beneficiaries and hold billions of dollars in sponsoring employer securities. The answers to the question presented will have a significant effect on the retirement security of all participants and beneficiaries of such plans.

ARGUMENT

I. The *Moench* Presumption Is Flatly Inconsistent with ERISA's Statutory Language, and Is Not Required to Balance the Different Provisions of ERISA.

A. The Statute Makes Clear that Fiduciaries Are Subject to the Prudent Person Standard, Not a Presumption of Prudent Investment.

In creating the "*Moench* presumption," the courts of appeals have simply disregarded an express, unambiguous requirement of ERISA – that a fiduciary is bound by the "prudent person" rule, according to which the fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

Even were the legislative history crystal clear that Congress "intended" something like a *Moench* presumption to apply, the courts would not be free, under standard principles of statutory construction, to disregard the express language of the Act.[2] But in

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[2] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *Oncale v. Sundowner Offshore Servs., Inc.*, 523

(Continued on following page)

fact, as demonstrated below, there is *no* legislative history that suggests a congressional preference for the *Moench* presumption. To the contrary, all available evidence suggests Congress intended that plans that invest in the sponsoring employer's securities – like every other plan subject to ERISA – be subject to the prudence requirement.

It is true that for "eligible individual account plans" (EIAPs) like the plan here at issue, Congress relaxed the statutory investment-diversification requirement that would otherwise apply under ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), as follows: The "diversification requirement . . . and the prudence requirement (*only to the extent that it requires diversification*) . . . is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities. . . ." ERISA § 404(a)(1)(C), (a)(2), 29 U.S.C. § 1104(a)(1)(C), (a)(2) (emphasis added).[3] The italicized language removes whatever doubt might have remained that *aside from diversification*, Congress meant for the usual prudence standard to apply to plans such as that presented here, as it does to all other plans.

U.S. 75, 79 (1988) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

[3] Subsequent legislation requires some degree of diversification, even in employee stock ownership plans (ESOPs). *See, e.g.*, 26 U.S.C. § 401(a)(28), (a)(35); ERISA § 204(j), 29 U.S.C. § 1054(j).

This exception does not present a statutory conflict, a "latent ambiguity" which courts might be forced to resolve by reference to drafter intent. Rather, as expanded in Part II below, the statute can be applied exactly as written: by requiring fiduciaries of EIAPs to adhere to a standard of prudence except to the extent prudence would require diversification. Stated another way, a fiduciary is guilty of having violated this requirement only if the fiduciary acted imprudently, *without regard to whatever imprudence inheres in the mere fact of nondiversification of assets.*

The standard as so applied would perfectly reflect the statutory language (and, as demonstrated below, congressional priorities). Instead, however, most courts of appeals have substituted a blanket *presumption* of prudence – a judicial construction completely at odds with the language of the statute, and which creates a barrier to ERISA litigants that not a shred of evidence exists to suggest Congress ever contemplated. The courts' departure from the statutory language extends as far as the imposition of a requirement that plaintiffs must allege a "dire situation," evidence that implicates the company's viability as an ongoing concern, or "evidence that the company is on the brink of collapse," and furthermore that "*[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment.*"[4] Such an extraordinary judicial disregard of express

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[4] *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (emphasis added).

statutory language would be shocking even in the absence of ERISA's stated purpose of protecting plan participants and beneficiaries.

B. "Fostering Employee Ownership" Is Not a Paramount Goal of ERISA.

1. The Statute Does Not Show "Fostering Employee Ownership" to Be Paramount.

Throughout their briefs, Petitioners and their *amici* assert that fostering employee ownership is a paramount goal under ERISA.[5]

The "protection of employee retirement savings" was the overarching central goal of ERISA. It is a mistake to view encouragement of employee ownership as having the same priority as the protection of employee retirement savings.

The statute itself does not permit this conclusion. Relative to protecting employee retirement savings, encouragement of employee ownership was an afterthought, one of many subordinate congressional policies that found their way into the statute.

ERISA provides that:

> It is hereby declared to be the policy of this [Act] to protect . . . the interests of participants

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[5] *See, e.g.*, Petitioners' Br. 4-7, 25-30, 35-40.

> in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

This statement of purpose is found in the statute itself. It is difficult to imagine how Congress could have expressed more clearly the Act's overriding purpose. There is no similar statement concerning the importance of encouraging employee ownership. Contrary to Petitioners' and their *amici's* arguments, the protection of the interests of participants and beneficiaries is more important than encouraging employee ownership. Congress enacted ERISA to "[protect] employee pensions and other benefits." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).[6]

2. Retirement Security, Not Employee Ownership, Is the Dominant Objective of Congressional Savings Policy.

Petitioners and their *amici* cite to legislative history – in particular the Tax Reform Act of 1976 –

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[6] *See* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 133-36 (2009) (discussing that courts have mistakenly elevated secondary purposes of ERISA over its primary one – protecting employees' retirement and welfare benefits).

in support of their argument of congressional support of encouraging employee ownership.[7] Yet their citations are taken out of context. Taking the long view of congressional savings policy, retirement security emerges as the dominant objective.

The Tax Reform Act of 1976 discusses Congress's desire to "encourage employee stock plans" and adds that "Congress is deeply concerned that the objectives sought by [ERISA and other laws] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976).

That statement of congressional "concern" does not purport to – and it does not – amend or dilute any provision of ERISA, much less the fiduciary duty provision that is central to the statutory scheme. As noted above, when Congress wanted to make exceptions for ESOPs, it did so explicitly. *See, e.g.*, ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (diversification).

Congress's "concern" was really a reaction to proposed Treasury and Labor Department regulations on prohibited transactions that would have made it impossible for ESOPs to be established and function effectively. S. Rep. No. 94-1236, at 539 (1976). The conference report itemizes the specific parts of the proposed regulations with which Congress was "concerned," which generally have to do with issues such

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[7] *See, e.g.*, Petitioners' Br. 35-40.

as loans to ESOPs, options on ESOP stock, voting rights and dividend restrictions applicable to ESOP stock. *See id.* at 540-42. None has anything to do whatsoever with ERISA's fiduciary duties.

More importantly, section 803(h) of the Tax Reform Act of 1976 was enacted as a substitute for a provision in the original Senate bill that would have exempted ESOPs from all of ERISA Title I – including all fiduciary responsibility rules – by simply declaring that ESOPs are not "employee benefit plans" and are thus not subject to ERISA at all.[8]

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[8] *See* Peter J. Wiedenbeck, *Trust Variation and ERISA's Misbegotten "Presumption of Prudence,"* forthcoming TAX NOTES (Mar. 2014) [hereinafter Wiedenbeck, *Trust Variation*] (manuscript at 19-20 & n.87), submitted to this Court by Respondents pursuant to Supreme Court Rule 32.3 on February 26, 2014. The Senate version of H.R. 10612, 94th Cong. § 804(g)(1), as reported July 10, 1976, with amendments, provided:

> An employee stock ownership plan which satisfies the requirements of paragraph (2)(A) [a cross-reference to the tax law definition in I.R.C. § 4975(e)(7)] shall not be considered to be an employee benefit, employee welfare benefit, or employee pension benefit plan (within the meaning of paragraph (2)(D)) under any law or rule of law of the United States other than [the Internal Revenue Code or the Tax Reduction Act of 1975]. * * *

S. Rep. No. 94-938(II), at 6 (1976) reports that the Finance Committee deleted a provision previously agreed to (above) that "would end the treatment of ESOP's as employee pension or welfare plans under Federal law (other than tax law)." *Id.* at 74 (same).

Petitioners and their *amici* overlook that as far as one can tell, all legislation supporting ESOPs was promoted by one Senator – Senator Russell Long, chairman of the Senate Finance Committee. While under Senator Long's Finance Committee leadership additional ESOP tax incentives were added in the years following ERISA's passage, once he retired in 1986, the flow of legislation waned.[9]

In 1986, the early distribution penalty was extended to apply to all qualified plans – including ESOPs – indicating that retirement income security should serve as the prime directive for EIAPs.[10] Also in 1986, the remaining ESOP tax credit was phased out of the code.[11] In 1989, the estate tax deduction on sales to ESOPs was repealed.[12] In 1996, the 50 percent income exclusion for interest income on ESOP loans was eliminated.[13]

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[9] For a detailed account of Senator Russell Long and his conversion to the gospel of employee stock ownership, *see* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 16-21); Andrew W. Stumpff, *Fifty Years of Utopia: A Half-Century After Louis Kelso's The Capitalist Manifesto, A Look Back at the Weird History of the ESOP*, 62 TAX LAW. 419, 425-26 (2009).

[10] Wiedenbeck, *Trust Variation*, *supra* (manuscript at 20-21).

[11] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1171, 100 Stat. 2085, 2513 (1986).

[12] *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7304, 103 Stat. 2106, 2352-53 (1989).

[13] *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1602, 110 Stat. 1755, 1833-34 (1996).

Prior to the 2006 Pension Protection Act ("PPA") amendments to ERISA, plans could require employer match shares (but not employee contributions) to be kept in employer stock until the participant terminated employment or reached a plan-stated age. The PPA amended ERISA to require that a defined contribution plan holding publicly traded employer stock must allow a participant to divest those securities after three years of service and invest the proceeds in other plan options. ERISA § 204(j), § 401(a)(35).

Even if a consistently expressed prior congressional policy in favor of employee ownership could be discerned (which it cannot), and even if it were generally permissible for the courts to take such a policy into account to override express statutory language (which it is not), *amici* believe it worth observing that the rationales that might have supported such a policy have since been discredited. When Congress enacted ERISA, most workers fortunate enough to be covered by a retirement plan participated in a traditional defined benefit pension plan. In the last two decades, there has been a dramatic shift from defined benefit plans to defined contribution plans. As this Court noted in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 401(k) plans like the plan at issue here have become – aside from Social Security – the primary vehicle for providing retirement income in America. 552 U.S. 248, 255 & n.5 (2008).

The problems arising from the shift of investment risk from employers (in defined benefit plans) to employees (in defined contribution plans) are

exacerbated when the investments in the defined contribution plan are in company stock. An employee is already massively under-diversified with respect to his or her human capital tied up with the employer, which is inextricably exposed to the business risks of his employer. The last thing that any employee should do is to magnify the intrinsic under-diversification of the employment relationship, by taking his or her diversifiable investment capital and tying that as well to the fate of the employer.[14]

The collapse of Enron raised the national awareness of the problem of employee ownership of a company. Enron Corp.'s 401(k) plan was typical of the pre-PPA genre. Enron matched 50 percent of all participant pre-tax contributions, up to a maximum of 6 percent of base pay, entirely in Enron stock. The plan required the participant to retain the match shares until age fifty. At year-end 2000, about 60 percent of the Enron plan's assets were invested in the Enron stock fund. The market price of a share of Enron stock declined from a high of $88 in September 2000 to less than a dollar in late 2001. Thus, when Enron collapsed, the employees of Enron lost their retirement savings at the same time they lost their jobs.

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[14] *See* John H. Langbein, Testimony to S. Comm. on Governmental Affairs, Jan. 24, 2002, *reprinted as* "What's Wrong with Employer Stock Pension Plans," in *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* 487 (Nancy B. Rapoport & Bala G. Dharan eds., 2d ed. 2009).

As noted by the Seventh Circuit Court of Appeals:

> The time may have come to rethink the concept of an ESOP, a seemingly inefficient method of wealth accumulation by employees because of the underdiversification to which it conduces. . . . The tax advantages of the form do not represent a social benefit, but merely a shift of tax burdens to other taxpayers. Nor are we aware of an argument for subsidizing the ESOP form, as the tax law does, rather than letting the market decide whether it has economic advantages over alternative forms of business structure. As for the notion that having a stake in one's employer will induce one to be more productive, the evidence for such an effect . . . is weak and makes no theoretical sense. An employee has no incentive to work harder just because he owns stock in his employer, since his efforts, unless he is a senior executive, are unlikely to move the price of the stock.

Summers v. State St. Bank & Trust Co., 453 F.3d 404, 411-12 (7th Cir. 2006) (citations omitted).

3. The *Moench* Presumption Undermines Participants' Rights Under ERISA.

Plan participants alleging a breach of fiduciary duty face a significant burden of proof. They must prove (1) that the fiduciary had a particular duty; (2) that the fiduciary breached that duty; and (3) that they suffered loss as a result of that breach.

The *Moench* court heightened this burden for ESOP participants, holding that "in the first instance, an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision." 62 F.3d at 571.

This presumption was created out of thin air by the Third Circuit. It contradicts the words of the statute, and neither the Third Circuit nor any successor court has identified a shred of evidence that Congress contemplated such a result.

Even if abuse of discretion were the appropriate standard of review, it has been misapplied by the courts of appeals through the imposition of additional requirements, as discussed in Part III.B below. Adding requirements to the abuse of discretion standard in company stock cases has resulted in plaintiffs' burden being very difficult, if not impossible (in particular on a motion to dismiss as discussed *infra* Section III.A), to satisfy.

Certain of Petitioners' *amici* argue that the presumption is necessary to "weed out meritless litigation." This position, however, ignores that a district court judge has all the tools necessary to weed out meritless cases under Fed. R. Civ. P. 12(b)(6) without resort to a presumption, in particular since this Court ruled in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As noted above, plan participants alleging a breach of fiduciary duty already face a significant burden of proof. If a plaintiff fails to plead facts making

plausible the conclusion that the fiduciary failed to comply with the prudent person standard, then the case should be dismissed under Rule 12(b)(6). That course by the lower courts would be far more consistent with the cardinal principles of judicial restraint.

4. The Diversification Exemption Does Not Exempt Fiduciaries from the Prudent Person Standard.

In support of their argument that Congress elevated employee stock ownership to paramount importance under the statute, Petitioners, their *amici*, and certain appellate courts[15] cite the statutory exemption from the diversification requirement. As discussed below, this position is not supported by either the text of ERISA or ERISA's legislative history.

Although prudent investment ordinarily requires diversification,[16] the need to diversify is inherently in tension with employee stock ownership plans, which concentrate the plan's assets in the employer's stock. Congress instructed precisely what to do about that tension:

> In the case of an eligible individual account plan . . . , the diversification requirement of

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[15] *See, e.g.*, *In re Citigroup ERISA Litig.*, 662 F.3d 128, 137 (2d Cir. 2011).

[16] *See, e.g.*, Restatement (Third) of Trusts § 90(b) (2007); Uniform Prudent Investor Act § 3 (1994).

> [Section 1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [Section 1104(a)(1)(B)] is not violated by acquisition or holding of . . . qualifying employer securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).

Section 1104(a)(2) thus makes clear that fiduciaries may invest in qualified employer securities without fearing liability for failing to diversify. But Section 1104(a)(2) also makes clear that Congress intended no further diminution of ERISA's fiduciary duties in order to encourage employee stock ownership. ERISA's requirement that fiduciaries act prudently is relaxed "only to the extent that it requires diversification." ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2). Insofar as acquiring or holding qualified employer securities is imprudent *for any reason other than the need to diversify* – such as when the employer stock is significantly overvalued – the unqualified "care, skill, prudence, and diligence" provision retains full force; it continues to mandate that the fiduciary take appropriate action to protect participants from imprudent investments. To hold otherwise would violate the maxim *expressio unius est exclusio alterius*. *See Vasquez v. Cargill, Inc.*, 509 F. Supp. 2d 903 (C.D. Cal. 2007) (applying maxim in an ERISA fiduciary case).

Turning to legislative history, the ERISA legislative history gives two reasons for the diversification exemption. First, it was common for such plans to invest in employer securities prior to ERISA. Second,

profit-sharing and stock bonus plans (including ESOPs) were viewed as having a different purpose than traditional pension plans.

ERISA's committee reports confirm this rationale. The pre-ERISA Treasury regulations describe the purpose of a profit-sharing plan as enabling employees or their beneficiaries to participate in the employer's profits. *See* Treas. Reg. § 1.401-1(a)(2)(ii), 21 Fed. Reg. 7276 (Sept. 25, 1956). The Senate Finance Committee Report on the bill that (with amendments) became ERISA states that "[s]ince profit-sharing and stock-bonus plans are intended to a large extent to serve as an incentive to employees by allowing them to participate in the profits of the company, the committee bill generally places no restriction on the purchase of employer securities by such plans." S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, at 4918.

Similarly, the House Conference Committee Report refers to "the special purpose of these individual account plans." H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, at 5097.

Section 401(k) of the Internal Revenue Code, I.R.C. § 401(k), was enacted in 1978, four years after ERISA. *See* Pub. L. No. 95-600, § 135(a), 92 Stat. 2763 (1978). A 401(k) plan is simply a type of defined contribution plan that allows participants to make elective contributions to the plan, which are sometimes matched by the employer. 401(k) plans are marketed by employers to employees as retirement

plans, not as a way to share in the employer's profits, and participants are encouraged to contribute to the plan to enhance their retirement income security. For example, the Plan document for the Fifth Third Bancorp Master Profit Sharing Plan states that "[t]he purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries." J.A. 284 (Plan, art. 1.2). Accordingly, whatever the situation when ERISA was enacted, the primary purpose of 401(k) plans and other defined contribution plans is now exactly the same as the primary purpose of traditional pension plans: to provide retirement income.

There is no hint in the legislative history that Congress intended the overall prudence requirement – or any requirement, other than diversification – to be altered for individual account or any other plans. To the contrary, in discussing the relationship between the prudence rule and the exemptions for eligible individual account plans, a Senate Committee report stated: "It is emphasized, however, that even with respect to the transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards." S. Rep. No. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, at 4867. This contradicts any suggestion that any aspect of the prudence rule other than diversification is abrogated by the exemption for eligible individual account plans.

Even several decisions accepting the *Moench* presumption acknowledge that the diversification

exemption does not relieve fiduciaries from compliance with ERISA's general fiduciary requirements. *See, e.g.*, *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585 (6th Cir. 2012), *reh'g en banc denied*, 2012 U.S. App. LEXIS 6721 (6th Cir. 2012); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008). In *Quan v. Computer Scis. Corp.*, the Court of Appeals for the Ninth Circuit stated:

> 29 U.S.C. § 1104(a)(2) does not exempt fiduciaries [for EIAPs] from the first prong of the prudent man standard, which requires a fiduciary to act with care, skill, prudence, and diligence in any investment the fiduciary chooses. Thus, fiduciaries are required to act "prudently" when determining whether or not to invest, or continue to invest, ERISA plan assets in the plan participants' employer's stock. This is true, even though the duty of prudence may be in "tension" with Congress's expressed preference for plan investment in the employer's stock.

623 F.3d 870, 878-79 (9th Cir. 2010) (citations omitted).

The Third Circuit, however, in creating the *Moench* presumption, wrongly asserted that not to do so "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify."[17] *Moench*

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[17] Petitioners' concern (Petitioners' Br. 17-18) for undercutting the growth of employee stock ownership is not borne out by the statistics. Between 1975 and 2009, the number of such plans

(Continued on following page)

v. Robertson, 62 F.3d 553, 570 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 26141 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). This is not true. The plaintiffs in all the cited cases specifically sought to prove a fiduciary's failure of prudence arising out of some act *other* than failure to diversify. Granting that it is never a *per se* ERISA violation for an EIAP to be invested entirely in employer stock (because of the exception to the diversification requirement), the facts of a particular case might show that a fiduciary had knowledge of specific circumstances that should have caused him or her to divest the plan of that stock, to stop buying or selling the stock, or to take other appropriate actions. However, it is in such cases, where the fiduciary breaches fall squarely within the type of conduct for which ERISA was intended to provide a remedy, that the *Moench* presumption has been applied to prohibit plaintiffs from even having an opportunity to establish those facts. Eliminating the presumption would permit those cases to proceed, while doing nothing to impair fiduciaries' general ability to ignore the diversification requirement for EIAPs.

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grew six fold, the number of participants in them grew over 40 fold, and their assets reached $869 billion. National Center for Employee Ownership, *A Statistical Profile of Employee Ownership* (Jan. 2012), http://www.nceo.org/articles/statistical-profile-employee-ownership. *See* Circuit Judge Chester J. Straub's dissent in *Citigroup*, noting that the absence of the *Moench* presumption before 1995 did not impede the growth of employee ownership. 662 F.3d at 152 (Straub, C.J., concurring in part and dissenting in part).

In sum, ERISA does not create a conflict between the prudence rule and the rules allowing ownership of employer securities by EIAPs. The statute provides a general rule (the prudence rule) and a well-defined and limited exemption from the diversification requirement. There is no question that a fiduciary must always meet ERISA's general fiduciary responsibility rules of prudence and loyalty when managing plan assets. It is perverse for the courts of appeals to have created a presumption that impairs those rules.

C. The Presumption Ignores the Difference Between ERISA Section 404(a)(1)(D) and Traditional Trust Law.

Under traditional trust law, a trustee must act in accordance with the trust documents. *See*, *e.g.*, Uniform Trust Code § 105(b)(2) (2010). Under ERISA, however, this duty is subject to a significant qualification: a fiduciary must act "in accordance with the documents and instruments governing the *plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter*." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (emphasis added). This Court has interpreted the provision to mean "that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA's policies." *Cent. States v. Cent. Transp.*, 472 U.S. 559, 568 (1985). This provision transforms the three core fiduciary principles of trust law in ERISA § 404(a)(1)(A)-(C), 29 U.S.C.

§ 1104(a)(1)(A)-(C) (loyalty, prudence and diversification) from default law into mandatory law.

In articulating the *Moench* presumption, the appeals courts have not followed the plain language of the statute.

For example, in *Lanfear v. Home Depot, Inc.*, the Eleventh Circuit ruled:

> Because the purpose of a plan is set by its settlors (those who created it), that is the same thing as saying that a fiduciary abuses his discretion by acting in compliance with the directions of the plan only when the fiduciary could not have reasonably believed that the settlors would have intended for him to do so under the circumstances. That is the test.

679 F.3d 1267, 1281 (11th Cir. 2012); *see also Citigroup*, 662 F.3d at 140 (adopting "intent of settlor test" and quoting Restatement (Second) of Trusts § 227 cmt. g (1959)); *Quan v. Computer Scis. Corp.*, 623 F.3d at 882 (same).

In focusing on the settlor's intent, these courts have essentially ignored ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Although this Court has emphasized that it is "guided by principles of trust law" when interpreting ERISA (*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), citing *Cent. States v. Cent. Transp.*, 472 U.S. at 570, it has also cautioned "that trust law does not tell the entire story. After all, ERISA's standards and procedural

protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. at 497. It follows "that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Id.* This is especially true in cases where the text of ERISA makes a significant departure from traditional trust law.

The reliance on the traditional trust law intent of the settlor principle is inappropriate for three reasons. First, and most important, with respect to the fiduciary duty to follow a trust document, ERISA does not mirror traditional trust law, as explained above. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

Second, the automatic assumption that the employer sponsoring the plan is the "settlor" of the pension trust is in error. Anyone who contributes to the fund is a settlor, presumably including employees who make elective deferrals under a 401(k) plan or a similar salary reduction arrangement.[18] Traditional private trusts involve a donative transfer: subject to limited exceptions, the beneficiaries who wish to accept the donor's bounty must follow his or her rules. By contrast, retirement benefits are compensation, earned by the participants, and in many cases are funded predominantly by employee contributions.

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[18] Wiedenbeck, *Trust Variation*, *supra* (manuscript at 5).

The significance of this point is that the expectations or purposes of the employer sponsoring an ESOP or 401(k) should carry no weight once continued investment in employer stock comes to jeopardize workers' retirement savings. Thus, the "purposes of the trust" should be determined by reference to the employee/settlors' understanding of the Plan, not the understanding of the employer/sponsor. Once the employer falls on hard times and the conflicting goals of the plan become salient, an employee will prioritize her interest in a comfortable retirement over employee ownership, and that participant-centered perspective casts a very different light on the "purposes of the trust" than if the sponsoring employer is treated as settlor.[19]

Third, even non-ERISA trust law is moving away from a focus on settlor intent:

> Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property . . . . [T]he new direction of American trust law is to rebalance the wishes of the settlor with the ownership rights of the beneficiaries. The administration of the trust must, in the end, be for the benefit of the beneficiaries, and their

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[19] *Id.* at 6.

> equitable ownership over the trust assets must be respected.

Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 225-26 (2011). *See also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) (discussing the long-standing but recently reformulated rule that a trust must be for the benefit of its beneficiaries) (*citing* Restatement (Third) of Trusts § 27(2) (2003); "a private trust, its terms, and its administration must be for the benefit of its beneficiaries" and Uniform Trust Code § 105(b)(3) (2010) requiring that "a trust and its terms [shall] be for the benefit of its beneficiaries").

The modern rules on equitable deviation state:

> The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.[20]

Contrary to Petitioners' position (Petitioners' Br. 30-34), under this approach it is not necessary "that the situation be so serious as to constitute an 'emergency' or to jeopardize the accomplishment of trust purposes."[21] Moreover, deviation "does not require changed circumstances. It is sufficient that the settlor

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[20] Restatement (Third) of Trusts § 66(1) (2003).

[21] *Id.* cmt. a.

was unaware of the circumstances in establishing the terms of the trust."[22] This, of course, displaces the far more restrictive "defeat or substantially impair" standard for administrative deviation under § 167 of the Second Restatement, the rule invoked by *Moench* and propounded by Petitioners. The Uniform Trust Code adopts a similar approach, noting in commentary that: "While it is necessary that there be circumstances not anticipated by the settlor before a court may grant relief . . . the circumstances may have been in existence when the trust was created." Uniform Trust Code § 412 cmt. at 76 (2010).

The cases adopting the *Moench* presumption suggest a scenario in which it will hardly ever be possible for plan participants to challenge an investment in employer stock. The plan sponsor designs a plan in which the fiduciaries are required to invest, and continue the investment, in employer securities. The plan design is a settlor function, so cannot be challenged as a fiduciary breach. The fiduciaries refuse to depart from the terms of the plan, and the courts' restrictive application of section 1104(a)(1)(D) protects them from liability for refusing. A challenge to the prudence of the investment is defeated by the *Moench* presumption. This looks like a back-door attempt at prohibited exculpation. ERISA forbids the trust agreement, plan documents, or other agreements or instruments from "reliev[ing] a fiduciary

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[22] *Id.*

from responsibility or liability" for its duties under ERISA. ERISA § 410(a), 29 U.S.C. § 1110(a).

II. The Appropriate Standard for Reflecting Congress's Decision to Permit Nondiversified Employee Stock Ownership.

Like many of the courts of appeals, Petitioners and their *amici* make much of a perceived "conflict" in ERISA between, on the one hand, the prudence requirement; and, on the other, the express exception to the diversification for plans that invest in employer stock.[23] As noted above, no such conflict exists.

Logically, diversification of assets is a subset of investment prudence – one specific *aspect* of prudent investment behavior, which was singled out for express treatment by Congress under ERISA. Logically also, Congress was able to, and did, relax this subset of the prudence requirement while keeping the rest of that requirement intact. Indeed it is difficult to see any other way to read the statutory provision here in question:

> [The] diversification requirement . . . and the prudence requirement (*only to the extent that it requires diversification*) . . . is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities. . . .

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[23] *See, e.g., Citigroup*, 662 F.3d at 137.

ERISA § 404(a)(1)(C), (a)(2), 29 U.S.C. §§ 1104(a)(1)(C), (a)(2) (emphasis added).

The correct way to interpret this provision is not to read it as creating a wholesale, blanket presumption of compliance with respect to the entirety of the prudence requirement. Rather, the provision asks courts to put the question: Has the fiduciary acted imprudently, *leaving aside any imprudence that inheres in the simple fact of nondiversification?* And it is entirely possible for a fiduciary to have done so: The fiduciary may be aware that *the specific company's securities* raise, currently, a *specific investment risk*. Indeed, that is exactly the claim made by the Respondents in this case. Such knowledge raises a prudential concern entirely apart from the inherent nondiversification concern which characterizes any investment in a single stock, and which was Congress's obvious concern in granting the relief in the above-quoted provision. There is simply no statutory basis for placing a "presumption of compliance" in the way of a claim for relief by a plan participant in these circumstances.

III. If the Court Accepts the Proposition that There Should Be a Presumption, the Presumption Should Not Be as Insurmountable as Suggested by Petitioners and Their *Amici*.

Even if there were a basis for a presumption of prudence in cases challenging the investment of plan assets in sponsoring employer securities (but see

above), the presumption of prudence should not apply at the pleading stage. Moreover, the standard applied by several circuits to overcome the presumption has transformed the presumption into a bar to any meaningful application of ERISA's prudence standard. Finally, the presumption should only apply to stand-alone ESOPs – not 401(k) plans that contain company stock funds.

A. The *Moench* Presumption Should Not Be Applied on a Motion to Dismiss.

Several Circuits have rejected the Respondents' and the United States' argument that the *Moench* presumption should not apply at the pleading stage. "The 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary." *Citigroup*, 662 F.3d at 139. *See also Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007); *Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2013); *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 990-91 (7th Cir. 2013).

The Sixth Circuit, however, disagreed noting that: "a plaintiff need not plead enough facts to overcome the presumption in order to survive a motion to dismiss. . . . [C]ourts should not make factual determinations of their own or weigh evidence when considering a motion to dismiss." *Pfeil*, 671 F.3d at 593 (citations omitted); *accord*, *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012) (Pet. App. 11-13).

This Court should follow the Sixth Circuit's approach and hold that the presumption does not apply on a motion to dismiss.

The fundamental problem with using the presumption as a pleading standard is that whether the fiduciaries breached their duty of prudence is a question of fact that is properly decided by the trier of fact on a full factual record, after the completion of discovery. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 534 n.3 (S.D. Tex. 2003). *See also LaLonde v. Textron, Inc.*, 369 F.3d 1, 6-7 (1st Cir. 2004) (expressing hesitance to apply a "hard-and-fast rule" in ERISA fiduciary duty cases, and instead noting the importance of record development of the facts). As noted in Part I.B. above, in the context of discussing why the *Moench* presumption is inappropriate at any stage, the facts of a particular case might show that a fiduciary had knowledge of specific circumstances that should have caused him or her to divest the plan of employer stock. At the very least, it should not apply at the motion to dismiss stage because this deprives plaintiffs of the opportunity to develop those facts. Indeed, *Moench* was decided on the merits, and thus, the implication is that the presumption was not originally intended to create a supplemental pleading requirement. *Moench*, 62 F.3d at 572 (reversing summary judgment for defendants on presumption issue, and remanding to trial court "for further proceedings in which the record may be developed and the case may be judged on the basis of the principles we set forth").

B. Several Courts of Appeals Have Transformed the Presumption into a Bar.

The *Moench* court stated that in "attempting to rebut the presumption, the plaintiff may introduce evidence that 'owing to circumstances not known to the settlor and not anticipated by him [the making of such investment] would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Moench*, 62 F.3d at 571 (quoting Restatement (Second) of Trusts § 227 cmt. g (1959)).

In a later case, the Third Circuit stated that a plaintiff need not necessarily prove that a company is "on the brink of bankruptcy" but must demonstrate more than possible fraud or corporate wrongdoing in order to rebut the presumption. *Edgar*, 503 F.3d at 349 n.13; *cf. Quan*, 623 F.3d at 879, quoting *In re Syncor ERISA Litig.*, 516 F.3d at 1102 ("there are a 'myriad of circumstances' that could violate the 'prudent man' standard for investment of ERISA plan assets in a company's own stock").

The Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits have said that plaintiffs must allege a "dire situation," evidence that implicates the company's viability as an ongoing concern, or evidence of "a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement." *White*, 714 F.3d at 994; *Citigroup*, 662 F.3d at 140; *Edgar*, 503 F.3d at 348-49; *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254-56 (5th Cir.

2008); *Quan*, 623 F.3d at 882; *Lanfear*, 679 F.3d at 1282. According to the *Quan* court, *"[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment* or that defendants ignored a decline in stock price." *Quan*, 623 F.3d at 882 (emphasis added). It is difficult to imagine a more direct contradiction by a court of a statute.

These courts have effectively invented the "dire situation" standard, in place of the specific standard of ERISA that all fiduciaries act "with the care, skill, prudence, and diligence under the circumstances . . . that a prudent man . . . familiar with such matters would use." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

In addition to imposing a very onerous burden on plaintiffs, these criteria do not give any guidance to decision makers. As Circuit Judge Straub stated:

> Such arbitrary line-drawing leaves employees wholly unprotected from fiduciaries' careless decisions to invest in employer securities so long as the employer's "situation" is just shy of "dire" – a standard that the majority neglects to define in any meaningful way.
>
> But the duty of prudence does not wax and wane depending on circumstance; ERISA fiduciaries must act prudently at all times, and those who are derelict must be subject to accountability.

Citigroup, 662 F.3d at 147 (Straub, C.J., concurring in part and dissenting in part).

The Sixth Circuit court took a different approach:

> In contrast to our sister circuits, we have not adopted a specific rebuttal standard that requires proof that the company faced a "dire situation," something short of "the brink of bankruptcy" or an "impending collapse." The rebuttal standard adopted in this Circuit, and the one which we are bound to follow, requires a plaintiff to prove that "a prudent fiduciary acting under similar circumstances would have made a different investment decision."

Pfeil, 671 F.3d at 595 (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)); *accord*, *Griffin v. Flagstar Bancorp, Inc.*, 492 F. App'x 598, 603-05 (6th Cir. 2012).

The Sixth Circuit further explained in this case:

> This unembellished standard makes sense – not just because it closely tracks the statutory language of § 404(a)(1)(B) – but also because that language imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries . . . We are not free to limit the standard set by the statute by imposing conditions not present in the statutory language.

Dudenhoefer, 692 F.3d at 418; Pet. App. 12-13 (emphasis in original).

The "dire situation" standard provides too much protection for fiduciaries at the expense of plan participants. Indeed, the standard articulated by several circuits is essentially irrebuttable. It would immunize fiduciary misconduct concerning company stock in virtually every case; even in *Enron* and *WorldCom*[24] – where the plans were heavily invested in company stock, while the company and its personnel, including fiduciaries, were engaged in criminal conduct that led to the company's collapse and the loss of the plans' entire investment in company stock – the fiduciaries would not be liable for their spectacular misconduct. Should this Court decide to adopt a presumption, the Court should adopt a standard, such as that in the Sixth Circuit, that is less onerous for plan participants.

C. The Presumption Should Not Apply to Company Stock Funds in 401(k) Plans.

Petitioners argue that the presumption should apply to stand-alone ESOPs, as well as 401(k) plans in which the company stock fund is an ESOP. If there is a presumption, it is the view of *amici* that the presumption should only apply to stand-alone ESOPs, and not ESOPs contained within a 401(k) plan.

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[24] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re WorldCom, Inc., ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

Petitioners cite to sections of ERISA and snippets from ERISA's legislative history to support their position of a congressional policy of promoting employee stock ownership through ESOPs. Yet, their citations only apply to stand-alone ESOPs, not 401(k) plans.

One of the fundamental reasons for allowing ESOPs – that (allegedly) providing employees with employer stock will increase employee productivity[25] – arguably does not apply to a company stock fund within a 401(k) plan, which is seen primarily as a retirement plan.[26] Further, in a typical 401(k) plan that offers a company stock fund, not all employees will have investments in the employer stock fund, as they would in a true, stand-alone ESOP.

Moreover, certain of petitioners' *amici* would have the presumption of prudence apply to *all* company stock funds within a 401(k) plan, even if the company stock fund is not an ESOP, and even if the plan language does not purportedly "require" the company stock fund.[27] Petitioners do not even support

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[25] *See Summers*, 453 F.3d at 411-12 (discussing the notion that having employer stock will increase productivity is "weak and makes no theoretical sense").

[26] As noted above, the purpose of the Fifth Third Bancorp 401(k) Plan is "to provide retirement and other benefits for participants and their respective beneficiaries." J.A. 284 (Plan, art. 1.2).

[27] *But see* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (requiring a fiduciary to discharge his duties in accordance with the terms of the trust only "insofar as such documents and

(Continued on following page)

this position and wisely so, as none of petitioners' arguments concerning the congressional policy of promoting employee stock ownership through ESOPs even touches on this argument. Congressional endorsement was of ESOPs which are intended primarily to invest in employer stock, not all 401(k) plans with an employer stock investment option.

CONCLUSION

ERISA's core goal is spelled out in its title: employee retirement income security. Resolution of the issues in this case is enormously important, as it potentially affects the retirement income security of millions of plan participants. The *Moench* presumption finds no support in the statute or legislative history. Also, as applied by certain courts, the presumption gives too much protection to fiduciaries and insufficient protection to participants and beneficiaries.

Thus, the *Moench* presumption should be rejected by the Court and the lower courts instructed to apply a standard of review that adequately protects the rights of participants and beneficiaries under ERISA.

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instruments are consistent" with other ERISA provisions, including the duty of prudence); and ERISA § 410(a), 29 U.S.C. § 1110(a) (stating "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy").

It is the view of *amici* that ERISA fiduciaries should be subject to the standard found in the statute. Prudential concerns are raised – as here – when the fiduciary may be aware that the *specific company's securities* raise a *specific investment risk*.

Even if some presumption is appropriate, it should not be applied at the pleading stage, the "dire circumstances" formulation of the standard should be modified to avoid acting as a bar to any meaningful claim under ERISA's fiduciary standards, and should not apply to 401(k) plans.

For the above stated reasons, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DAVID PRATT
Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
518-445-2311

LYNN L. SARKO
Counsel of Record
ERIN M. RILEY
KELLER ROHRBACK L.L.P.
1201 Third Ave., Suite 3200
Seattle, WA 98101
206-623-1900

AMICUS CURIAE BRIEF

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Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*

Petitioners,

v.

JOHN DUDENHOEFFER, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7382

MARK A. PERRY
Counsel of Record
PAUL BLANKENSTEIN
ASHLEY S. BOIZELLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amicus Curiae
Securities Industry and
Financial Markets Association

Library of Congress
Law Library

QUESTION ADDRESSED BY *AMICUS CURIAE*

Whether retirement plan fiduciaries and service providers are entitled to a strong presumption of prudence in allowing participants in a defined contribution plan to invest in the stock of their employer company and, if so, at what stage of the proceedings such a presumption attaches.

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H.R. Rep. No. 93-1280 (1974) (Conf. Rep.) 22

H.R. Rep. No. 93-533 (1973), *reprinted in*
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Hearings on Securities Litigation Reform Proposals S.240, S.667, and H.R. 1058 Before the Subcomm. on Sec. of the Comm. on Banking, Hous. & Urban Affairs, 104th Cong. 49 (1995).....31

Paul R. La Monica, *Chip Chip Hooray for Intel?*, CNNMoney (Jan. 12, 2004) 15

Joseph M. McLaughlin, *McLaughlin on Class Actions* (10th ed. 2013) 31

National Center for Employee Ownership, *A Brief Overview of Employee Ownership in the U.S.* 30

Restatement (Second) of Trusts § 167(1) (1959) 18

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S. Rep. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838 22

Securities Litigation: A Practitioner's Guide, Practicing Law Institute (Jonathan C. Dickey ed. 2012) 31, 33

U.S. Dep't of Treasury, Report on Employer Stock in 401(k) Plans, 2002 WL 313307 (Feb. 28, 2002) 25

BRIEF FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States. SIFMA's mission is to support a strong financial sector, while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise issues of vital concern to participants in the securities industry.

The majority of public companies that offer a participant-directed retirement plan, including many of SIFMA's publicly traded members, include an option for participants to invest in the stock of the employer company. In addition, SIFMA members regularly provide administrative, investment advisory, and other services to plan sponsors and fiduciaries in connection with retirement plans, including company stock investment options. Indeed, most retirement

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this *amicus* brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, counsel for SIFMA states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than SIFMA made a monetary contribution intended to fund the preparation or submission of this brief.

plans are not self-administered and require service providers, including many of SIFMA's financial services members, to assist fiduciaries in the plan's daily operations, usually pursuant to written agreements.

The rise in the use of defined contribution plans, in which employees make their own investment decisions within a range of options afforded by the plan, has spawned a rise in lawsuits like this one, in which participants allege after the fact that the plan fiduciaries or plan service providers breached their respective duties to participants by permitting them to invest in employer stock. Everyone involved in the structure and operation of defined contribution plans therefore benefits from clarity regarding their respective obligations, duties, and liabilities. Uncertainty in these areas would only reduce the number of investment options, in violation of congressional directives and basic principles of diversification. Increased uncertainty as to employer stock in particular may cause plan sponsors to refrain from offering employer stock investment options, thereby undermining the congressional judgment favoring such investments within ERISA-qualified plans, decreasing employee participation in such plans, and ultimately diminishing the value of overall retirement assets that are essential to the many Americans who are planning and saving for their golden years.

The so-called presumption of prudence standard, as articulated by the majority of the courts of appeals to have considered similar issues, provides needed certainty in this area, primarily to plan fiduciaries, but ultimately to all involved in the retirement system, including plan sponsors and service providers. By clarifying the duty of prudence in the employer stock context, this prevailing standard provides a

more stable basis on which to build a defined-contribution investment platform and ensures the continued availability and operation of employer stock investment options in plans.

SUMMARY OF ARGUMENT

Stock in a single company generally exhibits greater price volatility than other, more diversified investment options available to retirement plan participants, such as funds that invest in multiple securities to track industry or market indices. This volatility can arise due to conditions in the general economy, factors relevant to the particular sector in which the company operates, matters unique to the company, or some combination of all three. Although single equities are, for these and other reasons, generally disfavored as investment options for retirement planning, Congress favors and has repeatedly encouraged employee ownership of employer stock, including through retirement plans regulated pursuant to the Employee Income Retirement Security Act (ERISA). As a result, most public companies that sponsor a retirement plan offer their employees the opportunity to invest in company stock through a plan qualified under Section 401(k) of the Internal Revenue Code, an employer stock ownership plan (ESOP), or some other form of defined contribution plan.

I. ERISA plan fiduciaries are subject to myriad statutory obligations, including a duty to comply with the terms of the plan they administer and a duty to prudently select the funds in which plan partic-

ipants may invest.[2] Where an ERISA plan mandates that the fiduciary make company stock an investment option available to plan participants, fluctuations in the price of the sponsoring company's securities may produce an apparent tension between the fiduciary's duty to follow the plan's direction to continue to make company stock available to employees and the potential duty to protect the interests of plan participants against extraordinary declines in investment value. Specifically, if the trading price of company stock declines dramatically, the fiduciary may be forced to decide whether to ride the stock through a possible rebound in price, by allowing continued investment in company stock pursuant to the terms of the plan, or eliminate the stock as an investment option, either through divestiture or depriving plan participants of the option to invest additional amounts in company stock. As Petitioners observe, ERISA provides fiduciaries with flexibility in making these decisions by characterizing the duty of prudence as one that requires acting "with the care, skill, prudence, and diligence . . . that a prudent man . . . would use in the conduct of an enterprise of a like character and with like aims." *See* Pet. Br. 25-30 (referring to 29 U.S.C. § 1104(a)(1)(B)). ERISA also mandates that these decisions be viewed *ex ante*, from the perspective of a reasonably prudent person in similar circumstances, and not with the benefit of hindsight.

A. The "presumption of prudence" is a standard of primary conduct which presumes that fiduciaries for a plan that directs the offering of a company stock

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[2] Service providers, including many of SIFMA's members, often participate by contract in administering some of these functions.

investment option act prudently when they continue to permit plan participants to invest in company stock in accordance with the terms of the plan. A participant who exercises that investment option but later claims a fiduciary breach may overcome the presumption only if he or she can allege facts to demonstrate that the fiduciary abused its discretion by adhering to the plan terms despite a serious question about the company's viability as an ongoing entity. By presuming prudence when the fiduciary complies with the plan terms, this standard provides critical protection for plan fiduciaries, and those who contract with them, from liability for not being prescient as to movements in the stock market. It also confirms that fiduciaries need not use or disclose material non public information to protect plan participants, in violation of the securities laws. And it provides certainty and spares fiduciaries from a paralyzing choice between violating plan terms by divesting from or eliminating company stock investment options, or violating ERISA by not divesting from or eliminating such options and harming plan participants. For these reasons, the presumption of prudence standard has been adopted by every circuit court to have considered similar issues.

B. The presumption of prudence standard is consistent with and, indeed, mandated by ERISA's statutory scheme, which directs fiduciaries to comply with plan terms and exempts fiduciaries for plans that direct the offering of company stock investment options from the duty to diversify. It is also consistent with the common law of trusts, this Court's directive to "develop a federal common law of rights and obligations under ERISA-regulated plans" (*Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (internal quotation marks omitted)), and Con-

gress's dual interests in protecting plan participants and promoting employee ownership of employer stock.

By affirming the primacy of settlor directives and investor autonomy, protecting ERISA fiduciaries from unreasonable theories of liability, and holding fiduciaries accountable under ERISA only when a participant can prove an abuse of discretion, the presumption of prudence standard facilitates the continued availability and operation of company stock investment options. A decision that declines to provide this essential protection to fiduciaries required to offer company stock as an investment option will almost certainly reduce the availability of such options, in violation of Congress's clear preference for employee ownership of company stock.

II. Because the presumption of prudence is a substantive standard of liability under ERISA, it must be applied at the pleading stage. The Sixth Circuit's contrary conclusion not only flouts this Court's precedents but imperils the continued availability of company stock investment options. A defined contribution plan participant cannot plausibly assert a fiduciary breach without alleging facts that demonstrate that the fiduciary abused its discretion by continuing to follow the plan's direction to invest in company stock despite serious questions about the company's ongoing viability. The Sixth Circuit's refusal to apply the presumption of prudence standard at the pleading stage increases uncertainty by exposing plan fiduciaries and service providers, including many of SIFMA's members, to costly, and often meritless, litigation. It also provides plaintiffs with an end-run around the heightened pleading requirements in securities cases, which often overlap with the claims advanced in ERISA stock-drop suits.

The Sixth Circuit's decision should be reversed, and the district court's judgment dismissing this action should be reinstated.

ARGUMENT

There are generally two types of retirement plans: defined benefit plans, which are traditional pension plans wherein the plan sponsor promises participants a specified benefit upon retirement; and defined contribution plans, in which the plan participants contribute money (often with a "matching" component from the employer), and the retirement benefit is determined by the amount contributed and the performance of the investment options to which the contributions have been allocated. *See* 29 U.S.C. § 1002(34), (35). When ERISA was enacted in 1974, defined benefit plans were the norm, whereas "[d]efined contribution plans," like those authorized by section 401(k) of the Internal Revenue Code, "dominate the retirement plan scene today." *LaRue* v. *DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 255 (2008). Indeed, the overwhelming majority of defined contribution plans operating today are 401(k) plans, and most such plans sponsored by public companies offer company stock as an investment option—in other words, participants are permitted to invest their retirement savings in the stock of their employer—pursuant to an express directive in the plan itself.

This case is one of about 250 "ERISA stock-drop cases" in which defined contribution plan participants have sued a plan fiduciary or service-provider for continuing to offer company stock as an investment option (or for not requiring divestiture of prior investments in company stock) under a defined contribution plan. The great majority of ERISA stock-

drop cases involve 401(k) plans that allow participants to allocate their accounts among a number of investment options, including company stock investment if the participant so chooses. Many 401(k) plans that offer company stock as an investment option designate the company stock fund maintained by the plan as an ESOP. This brief will focus on the presumption of prudence in cases where the terms of a 401(k) plan require company stock to be offered as an investment option. The principal difference between a 401(k) ESOP and a non-401(k) ESOP is that non-401(k) ESOPs invest exclusively in company stock (plus a small amount of cash to meet the plan's liquidity needs). Both 401(k) ESOPs and non-401(k) ESOPs qualify as eligible individual account plans (EIAPs), which are exempt from the duty of diversification imposed by ERISA on most plan fiduciaries. 29 U.S.C. §§ 1104(a)(1)(D), 1107(d)(3).

The Sixth Circuit's decision in this case, in sharp contrast with the decisions of every other circuit to have considered company stock investment through a defined contribution plan, would permit ERISA stock-drop cases to survive a motion to dismiss based solely on allegations that the employer's stock price substantially declined. This approach, if accepted by this Court, would put those charged with administering employer-sponsored defined contribution plans—usually the plan fiduciaries, but potentially service providers as well—in an untenable position by exposing them to costly litigation both for continuing to permit investment in or the holding of company stock when the stock price decreases, and for violating the plan terms and divesting company stock from the plan if the stock price later rebounds.

To avoid this quandary, five circuits have applied a "presumption of prudence" standard at the plead-

ing stage in actions against ERISA plan fiduciaries, presuming that the fiduciary acted prudently by following the plan terms where the plan sponsor directed that company stock be offered as an investment option (a settlor decision). Those circuits also afford participants an opportunity to overcome the presumption by alleging that the fiduciary committed an abuse of discretion because it had reasonable grounds to believe that the plan sponsor would no longer wish it to allow investment in employer stock. In other words, the participant can allege that the company was in such dire financial circumstances that continued investment in its stock undermined the plan sponsor's purpose in mandating such stock as a plan investment.

Of all the circuit courts that have considered the question, the Sixth Circuit alone has erroneously treated this standard as an evidentiary presumption and declined to apply it at the motion to dismiss stage. The Sixth Circuit's decision contravenes ERISA's statutory scheme, undermines Congress's interest in promoting company stock ownership, and fundamentally misunderstands the roles of ERISA plan sponsors, fiduciaries, and service providers in matters of employee ownership of employer stock. It should be reversed.

I. COMPANY STOCK INVESTMENTS ARE GOVERNED BY THE PRESUMPTION OF PRUDENCE STANDARD

Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Consistent with this objective, ERISA fiduciaries are required to "discharge [their] duties . . . with the care, skill, prudence, and dili-

gence under the circumstances . . . that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," 29 U.S.C. § 1104(a)(1)(B); to follow "the documents and interests governing the plan insofar as [they] are consistent with [ERISA]," *id.* § 1104(a)(1)(D); and to diversify investments, *id.* § 1104(a)(1)(C). A plan participant who complains that any investment option—including the opportunity to invest in company stock—was imprudent must plead, and ultimately prove, that these standards were transgressed.

A. Congress Favors Investment In Company Stock

Company stock, like other non-diversified equity securities, carries more risk and is subject to greater price volatility than diversified investment options such as mutual funds, index funds, or other "baskets" of investments. Nevertheless, Congress favors employee ownership of company stock and has repeatedly encouraged the offering of such investment options as a means of promoting economic growth. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (noting Congress's interest in "encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system"); *see also* 129 Cong. Rec. S16629, S16636 (daily ed. Nov. 17, 1983) (statement of Sen. Long) (describing ESOPs as both an employee retirement plan and a "technique of corporate finance" that would encourage employee ownership).

Congress's encouragement of company stock investment is also evident in numerous federal taxation statutes that grant favorable tax status to employer stock offerings and appreciation on such in-

vestments. Among other benefits, appreciation on company stock is taxed at long-term capital gains rates, while appreciation on other investments in 401(k) plans is taxed as ordinary income on distribution. *See* 26 U.S.C. § 402(e)(4). Congress has also provided ESOPs with a corporate tax credit and made employer contributions to such plans fully deductible by the employer. *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

Congress has sought to bolster company stock investment by expressly instructing courts to refrain from judicial action that would thwart investment in company stock or "treat employee stock ownership plans as conventional retirement plans." 26 U.S.C. § 4975 (notes); *see also* Tax Reform Act of 1976, § 803(h), 90 Stat. at 1590. Favorable legislative treatment of employee investment in company stock is not limited to ESOPs, but extends to company stock investment options in 401(k) plans.

As a result of Congress's encouragement and its tax-favorable treatment of company stock investments, the majority of public companies offer employees opportunities to invest in company stock through a 401(k) plan. These plans are overseen by fiduciaries, often with the help of plan service providers who assist in carrying out the plan sponsor's directions.

B. Company Stock Investments Raise Particularized Issues

In keeping with its general preference for employee ownership of company stock, Congress exempted fiduciaries of defined contribution plans that offer company stock as an investment option from

the duty to diversify investments. *See* 29 U.S.C. § 1104(a)(2). Congress also limited the duty of prudence for these fiduciaries to eliminate any obligation to diversify to reduce risk. *See ibid.* Congress's favorable treatment of company stock investment options through ESOPs and 401(k) plans is consistent with its general support for employee ownership of employer stock.

Notwithstanding the exemption from the duty to diversify, fiduciaries continue to be subject both to a duty to follow the plan terms and to offer appropriate investment options to plan participants. In complying with these duties, fiduciaries face particularized concerns that are unique to the company stock context and are rooted in the risks associated with investment in a non-diversified, single equity security.

It is well established that employer stock investments are generally subject to greater price volatility than diversified investments, such as mutual funds, that are common to 401(k) plans. Like other single equity investments, the price of company stock is subject to a variety of influences, including conditions in the general economy, factors specific to the sector in which the company operates, matters unique to the company, or some combination of all three.

As a result of company stock's greater price volatility, those charged with administering a plan that mandates an option to invest in company stock must determine how best to address significant drops in the price of company stock. Frequently, only hindsight will reveal whether one course or the other would have maximized returns to plan participants. Fiduciary decisionmaking, however, cannot be reviewed *ex post*; the question in every case is whether

the fiduciaries acted, on the information then available, as would a reasonably prudent person in like circumstances. *See* 29 U.S.C. § 1104(a)(1)(B); *see also Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008).

This market reality puts plan fiduciaries and their advisers in a veritable Catch-22: On the one hand, if they continue to offer the option to invest in employer stock despite declining stock prices, and the stock price continues to fall, they are vulnerable to suit for failing to act to prevent further plan losses, whereas if they divest or eliminate employer stock investment options from the plan, and the stock price rebounds, they may be sued for violating the terms of the plan. This dilemma prompted one court to describe the fiduciary's position as falling in "a narrow channel between two different forms of liability—the Scylla of unwarranted disobedience to the plan documents lurks on one side, while the Charybdis of imprudence swirls on the other." *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883 (E.D. Mich. 2008).

The fiduciary's position is particularly precarious given that stock prices rise and fall with some regularity. Indeed, given the inevitability of stock market fluctuation, a prudence standard that exposes an ERISA fiduciary to liability on the basis of declining company stock prices alone, as affirmance of the decision below would allow, would require constant vigilance and second-guessing of the plan terms by the fiduciary—a result that is inconsistent with ERISA's express command to fiduciaries to comply with the plan documents. *See* 29 U.S.C. § 1104(a)(1)(D). It would also create an incentive for fiduciaries to overreact to stock price fluctuations, possibly exacerbating decreases in stock values and ultimately injuring

the very plan participants the fiduciaries are charged with protecting. *Cf. In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) (observing that eliminating company stock as an investment option "is a clarion call to the investment world that the [plan fiduciary] lacked confidence in the value of its stock, and could have a catastrophic effect on [the] stock price, severely harming . . . Plan members"), *aff'd sub nom. Quan* v. *Computer Scis. Corp*, 623 F.3d 870 (9th Cir. 2010).

The "damned if you do, damned if you don't" dilemma is not merely hypothetical, but real, as illustrated in twin cases brought by participants in the same ERISA plan. In one case, one set of plan participants claimed that the plan fiduciaries breached their duties by failing to eliminate company stock from the plan when the company's financial woes sent it into bankruptcy. In the second case, another group of participants in the same plan claimed that the fiduciaries violated their duties by divesting company stock during the company's bankruptcy after the price of the stock rose significantly, even though the bankruptcy sale price was in excess of market. *Compare Evans* v. *Akers*, 534 F.3d 65 (1st Cir. 2008), *with Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009); *see also Tatum* v. *R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004) (involving suit by plan participants that were required to divest from employer stock investments before the stock rebounded). For plan fiduciaries and service providers confronted with the need to make a decision in the face of declining stock price, these lawsuits are a cautionary tale that highlights the risks associated with *any* course of action.

To add further uncertainty, there are numerous historical examples of companies that experienced a

steep decline in stock price, followed by a dramatic rebound. For example:

- Between December 10, 2007 and March 6, 2009, the price of Textron stock dropped from a high of $74.40 to $3.57. Within a year, however, the price rose to over $28.00.

- Between August 31, 2000 and October 8, 2002, Intel Corp.'s stock price declined more than 80% from its high of approximately $75.00 to $13.04. Intel recovered and became the best performing stock in the Dow Jones Industrial Average in 2003. *See* Paul R. La Monica, *Chip Chip Hooray for Intel?*, CNNMoney (Jan. 12, 2004), http://money.cnn.com/2004/01/12/technology/intel/.

- Between March 27, 2000 and October 8, 2002, the price for Cisco Systems' stock dropped from $80.00 to $8.60. By June 30, 2004, Cisco stock closed at $23.70, up more than 175% from its low price.[3]

- The stock price for Yahoo, Inc. declined more than 95% from its year-end 1999 adjusted price in excess of $100.00 to $4.06 on September 26, 2001. As of June 30, 2004, Yahoo stock closed at $36.40, up almost 800% from its low price.

In each instance, employees that maintained investments in the stock, following the steep decline in the stock price, would have benefitted from a price rebound. To be sure, the possibility that stock prices will rebound makes it difficult for ERISA fiduciaries to determine *ex ante* whether divesting or prohibiting

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[3] Closing stock prices are derived from the Center for Research in Security Prices.

employees from investing in company stock is an appropriate investment strategy or merely shortsighted.

Ultimately, ERISA fiduciaries must choose between complying with the plan terms and trusting that the company's misfortunes are temporary and disregarding the plan terms on the expectation that the company's business will fail—an expectation that could turn into a self-fulfilling prophecy as the market absorbs the information that the company's retirement plan is no longer permitting investment in company stock. Plan participants and their class-action lawyers have exploited this quandary in bringing hundreds of suits against ERISA fiduciaries on the theory that plan fiduciaries and others acted imprudently by failing to divest from or eliminating the option to invest in employer stock following a decrease in the stock price.

Facing a deluge of stock-drop litigation, courts have followed this Court's directive to apply federal common law to determine fiduciary obligations in the ERISA context. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). The "presumption of prudence" is the moniker used by most courts to describe the standard of substantive conduct applicable to plan fiduciaries facing the exigencies of overseeing a plan that directs investment in company stock. It strikes the necessary balance between the fiduciary's duty to follow the direction of the plan sponsor, and the duty to act prudently in the interest of plan participants when the employer's continuing viability is in jeopardy.

C. The Presumption Of Prudence Addresses The Particularized Issues Of Company Stock Investments

This Court has observed that "ERISA abounds with the terminology and language of trust law." *Firestone*, 489 U.S. at 110. The lower courts thus have looked properly to the common law when determining how to construe ERISA's duty of prudence in the context of significant declines in the employer's stock price. These courts have been guided by ERISA's statutory structure, which protects and encourages company stock investment options, *see* 29 U.S.C. § 1104(a)(2), and by longstanding principles of trust law. They have also been guided by the practical realities of non-diversified equities, in particular, their greater price volatility and Congress's encouragement of employee ownership of company stock. *See, e.g.*, *Moench* v. *Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) (observing that "the concept of employee ownership constituted a goal in and of itself"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983) (observing that employer stock option plans "expand[] the national capital base among employees—an effective merger of the roles of capitalist and worker").

In construing the duty of prudence in the context of company stock ownership, the courts of appeals have relied on two principles from the common law of trusts. First, a trustee is bound to follow mandatory trust terms to the letter. *See* Restatement (Third) of Trusts § 91 & cmt. e (2007); *see also White* v. *Marshall Ilsley Corp.*, 714 F.3d 980, 986 n.4 (7th Cir. 2013) (observing that the duty to comply with the terms of the plan originates in trust law, "which requires a trustee to act in accord with the terms of the trust"). This principle is based on the notion that de-

signing a plan is a *settlor*, not a *fiduciary*, function. *See Pegram* v. *Herdrich*, 530 U.S. 211, 226 (2000); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443-45 (1999); *Lockheed* v. *Spink*, 517 U.S. 882, 890 (1996). It is also based on the recognition that it would be nonsensical both to encourage employers to prescribe employer stock funds and company stock investment options, as Congress has done, and simultaneously impose on fiduciaries a burden to override the employer's plan design choices under penalty of fiduciary liability. To this end, trust law holds that mandatory terms "displac[e] the normal duty of prudence" that is imposed on trustees. *See* Restatement (Third) of Trusts § 91 & cmt. e; *see also Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 346 (3d Cir. 2007) ("if the trust 'requires' the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry'").

Second, a trustee should only deviate from the terms of the trust where, "owing to circumstances not known to the settlor and not anticipated by him[,] compliance would defeat or substantially impair the accomplishment of the purposes of the trust." Restatement (Second) of Trusts §§ 167(1), 227 cmt. q (1959); *see also Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012). Accordingly, where (and only where) circumstances have changed such that compliance with the plan terms would no longer further the purposes of the trust, the trustee is permitted to disregard the settlor's direction.

Based on these principles, courts have developed the "presumption of prudence," whereby an ERISA fiduciary's paramount obligation, like that of other trustees, is to follow the intent of the settlor, as reflected in the terms of the plan. That obligation is

overcome only if "the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's] direction was in keeping with the settlor's expectations of how a prudent trustee would operate." *Moench*, 62 F.3d at 571. Consistent with the common law, plaintiffs are required to show that, owing to unforeseen circumstances, the prescribed investment "'would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Id.* (quoting Restatement (Second) of Trusts § 227 cmt. q).

The presumption of prudence standard was first recognized by the Third Circuit in *Moench* and has been adopted by every subsequent circuit to address the issue. *See, e.g.*, *White*, 714 F.3d at 994-95; *Lanfear*, 679 F.3d at 1281; *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140-41 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 475 (2012); *Quan*, 623 F.3d at 882; *Kirschbaum*, 526 F.3d at 256.[4]

Each of these courts has recognized that ERISA fiduciaries should not be liable for lack of prescience and that employer-issued stock, like any security or non-diversified investment, is inherently volatile and

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[4] Although different circuits have phrased the standard in different terms, the majority of them agree on the substance, namely that a plaintiff must show that the fiduciary knew or should have known that the employer's survival was in serious peril. *See, e.g.*, *White*, 714 F.3d at 986 (observing that if the company's "viability is in jeopardy, the employer's stock may not be a prudent investment"); *Citigroup*, 662 F.3d at 140-41 (plaintiffs must prove that company faced "impending collapse" or "dire circumstances"); *Quan*, 623 F.3d at 882 (plaintiffs must allege facts that implicate the company's viability as an ongoing concern); *Kirschbaum*, 526 F.3d at 255-56 (same); *Edgar*, 503 F.3d at 348-49 & n.13 (affirming dismissal because plaintiff did not show that company was in a "dire situation").

subject to changes in price and valuation. *See Moench*, 62 F.3d at 568 (observing that employer stock option plans, "unlike pension plans, are not intended to guarantee retirement benefits, and indeed, by [their] very nature . . . place[] the employee retirement assets at much greater risk than does the typical diversified ERISA plan") (internal quotation marks omitted); *see also DeBruyne* v. *Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) (ERISA "requires prudence, not prescience") (internal quotation marks omitted). Accordingly, they have applied the presumption of prudence standard as an objective standard that is reviewed from an *ex ante* perspective.[5]

Contrary to the decision below, the "presumption of prudence" is not evidentiary in nature. *See Citigroup*, 662 F.3d at 139 ("The 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary."); *see also Edgar*, 503 F.3d at 349. Rather, it is a substantive standard of conduct against which a fiduciary's continued offering of employer stock is measured. *See Lanfear*, 679 F.3d at 1281 (disavowing "any intention of using . . . the word 'presumption' in a sense that has any evidentiary weight").

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[5] Applying the presumption of prudence in this situation is comparable to applying an "abuse of discretion" standard to review decisions of a plan's fiduciaries concerning plan interpretation. *See Conkright* v. *Frommert*, 559 U.S. 506 (2010). In both instances, the court is directed to ask whether the fiduciary's interpretation of what was required by the plan, and by extension, the plan sponsor, was objectively reasonable. There is no rational reason to show less deference to fiduciaries who are acting consistently with unambiguous plan provisions than to fiduciaries who are exercising discretion regarding the meaning of ambiguous plan terms.

Ultimately, the presumption of prudence standard works to enhance clarity and predictability for ERISA fiduciaries and their advisers by relieving fiduciaries from liability for failing to require divestiture or to withdraw the option to invest in company stock merely because the stock price declined, while holding them accountable to plan participants if they fail to act when it is readily apparent that the company faces truly dire financial circumstances. The presumption is consistent with the "long-term horizon of retirement investing" (*Kirschbaum*, 526 F.3d at 254), and is premised on the understanding that, if company stock ownership is to occur, as Congress intended, fiduciaries who allow employees to choose to invest in company stock, as directed by the terms of the plan, need protection from liability for doing so.

As the Seventh Circuit has explained, "[w]ithout this shield, the duty of prudence would leave fiduciaries exposed to liability based on 20-20 hindsight for mere swings in the market or other foreseeable circumstances in which reasonable fiduciaries and other investors could easily disagree about the better course of action." *White*, 714 F.3d at 990. Indeed, a less rigorous standard would effectively convert fiduciaries into insurers against loss from significant stock market declines. That dynamic is not what Congress contemplated, nor what ERISA commands.

D. The Presumption Of Prudence Is Consistent With ERISA

As noted above, ERISA is rooted in the common law of trusts. *Firestone*, 489 U.S. at 110. Indeed, Congress referred to the common law of trusts throughout ERISA and its legislative history. *See, e.g.*, 29 U.S.C. § 1103(a) ("assets of an employee ben-

efit plan shall be held in trust"); S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (identical language).

In keeping with ERISA's history and structure, this Court has directed lower courts "to develop a federal common law of rights and obligations under ERISA-regulated plans" (*Firestone*, 489 U.S. at 110 (internal quotation marks omitted)), and to use trust law in evaluating the actions of ERISA plan administrators. *See Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 111 (2008) ("In determining the appropriate standard of review, a court should be guided by principles of trust law.") (internal quotation marks omitted); *LaRue*, 552 U.S. at 253 n.4 ("common law of trusts . . . informs [the Court's] interpretation of ERISA's fiduciary duties"). The presumption of prudence standard is an answer to this call.

The presumption is also consistent with Congress's preference for employee ownership of company stock, as demonstrated in the exemption for 401(k) plans and other EIAPs from ERISA's duty to diversify. *See* 29 U.S.C. § 1104(a)(2). The special treatment afforded these defined contribution plans is consistent with Congress's recognition that employee stock ownership serves a "special purpose" by allowing for employee investment in the employer plan sponsor itself. *See* H.R. Rep. No. 93-1280 at 317 (1974) (Conf. Rep.). It also suggests that Congress wished to insulate ERISA fiduciaries from an obligation to divest or eliminate options to invest in em-

ployer stock merely because the stock price declined, even substantially.

Congress has demonstrated its support for company stock ownership through numerous federal tax laws, which encourage employer stock investment options by granting favorable tax treatment to employer contributions to ESOPs and appreciation on employer stock held through 401(k) and other EIAPs. *See* App. A; *see also* American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 383; Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Revenue Act of 1978, Pub. L. No. 95-600, § 141, 92 Stat. 2763; Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26.

Congress has made clear that courts should not impede the offering of employer stock option plans by treating them like conventional retirement investments. Specifically, Congress expressed

> deep[] concern . . . that the objectives sought by [the laws encouraging employer stock investment options] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, § 803(h), 90 Stat. at 1590.

Courts construing the scope of fiduciary responsibilities under ERISA are required to do so against the backdrop of Congress's endorsement of employee investment in company stock and its admonition to

refrain from limiting or discouraging these investments by treating them like more conventional retirement plan investment options. The presumption of prudence standard is consistent with ERISA's common law backdrop, while also advancing Congress's interests in promoting employee ownership of employer stock and protecting plan participants from action by ERISA fiduciaries that is contrary to the directions of the plan sponsor.

E. The Presumption Of Prudence Standard Serves Other Important Policy Interests

The presumption of prudence standard also constitutes good public policy by reinforcing longstanding principles of investor choice and protecting ERISA fiduciaries from unreasonable theories of liability.

First, the presumption of prudence rightly recognizes that the price of company stock will fluctuate, sometimes greatly. Only through hindsight can a fiduciary know whether a substantial decline in the price of the employer's stock is a temporary consequence of general economic conditions, or a reflection of the company's dire financial circumstances. The presumption of prudence protects fiduciaries from liability for "lack of omniscience and foresight." *White*, 714 F.3d at 992.

Second, the presumption of prudence standard reinforces the principle that investors in 401(k) plans in particular are autonomous actors who are generally responsible for making ultimate decisions about how to invest their funds. *See White*, 714 F.3d at 994 (observing that ERISA fiduciaries "do not have enough information about an employee's other assets, family circumstances, risk tolerance, and so on, to provide such individual advice"). Relatedly, the

presumption recognizes that, while Congress favors employee stock ownership in defined contribution plans, plan sponsors and administrators do not guarantee the performance of any investment, including company stock. Plan participants retain both the opportunity and the obligation to manage their own investment portfolios. The presumption promotes investor autonomy by imposing a high threshold before fiduciaries are permitted to deprive plan participants of the ability to invest in employer stock, in contravention of the plan terms.

Third, the existence of the option to invest in company stock in a 401(k) plan encourages employees to participate in the plan, thereby serving the national goal of increasing employee participation in retirement savings plans. *See* U.S. Dep't of Treasury, Report on Employer Stock in 401(k) Plans, 2002 WL 313307 (Feb. 28, 2002). Eliminating the presumption of prudence standard would almost certainly result in fewer opportunities to invest in company stock and therefore lower rates of employee participation in retirement investment plans. Thus, the position taken by the Executive Branch at the petition stage of this case directly contravenes the frequently expressed views of the Legislative Branch.

Fourth, the presumption of prudence standard plays a crucial role in facilitating the inclusion of options to invest in company stock in 401(k) plans, consistent with Congress's intent under ERISA. In contrast, adopting the position that fiduciaries should not be subject to a presumption of prudence at all, as the government advocates here, will expose fiduciaries to unpredictable and unmanageable risks and will likely cause employers, which regularly indemnify plan fiduciaries, to forego offering employer stock plans and investment opportunities altogether. *See*

White, 714 F.3d at 987 (observing that "[s]uch a high exposure to litigation risks in either direction could discourage employers from offering ESOPs, which are favored by Congress, or even from offering employee retirement savings plans altogether"). The Department of Labor has made that argument in many cases, but no court of appeals has adopted it. This Court should not do so either.

Finally, the presumption protects fiduciaries from the temptation to act on inside company information to protect plan participants, in violation of federal insider trading laws. *See* 15 U.S.C. § 78j(b). While participants might (or might not) benefit if fiduciaries acted on adverse non public information, ERISA's fiduciary obligations do not require fiduciaries to violate the securities laws. *See Kopp* v. *Klein*, 722 F.3d 327, 339-40 (5th Cir. 2013), *petition for cert. filed*, No. 13-578 (2013); *see also White*, 714 F.3d at 992. As the Eleventh Circuit put the point in *Lanfear*, "[j]ust as plan participants have no right to insist that fiduciaries be corporate insiders, they have no right to insist that fiduciaries who are corporate insiders use inside information to the advantage of the participants." 679 F.3d at 1282; *see also Quan*, 623 F.3d at 881 (the *Moench* presumption "gives fiduciaries a safe harbor from failing to use insider information"); *Kirschbaum*, 526 F.3d at 256 ("in some cases, requiring a fiduciary to override the terms of a company stock purchase plan could suggest the necessity of trading on insider information. Such a course is prohibited by the securities laws"). Indeed, whatever Congress may have meant by the obligation to exercise "prudence" in supervising an ERISA plan, it could not have meant that ERISA fiduciaries are required to violate insider trading laws.

Abrogating the presumption, and thus requiring ERISA fiduciaries to second-guess the wisdom of mandatory company stock investment options, would make it considerably harder for ERISA fiduciaries to reconcile their duties under ERISA with securities law compliance. Fiduciaries would be bound not to make use of material non public information under securities laws, but would be required to use that information for the benefit of plan participants under ERISA. Because personal liability attaches under ERISA, the stakes can be considerable. *See* 29 U.S.C. § 1109(a).

The government dismisses this possibility, suggesting that plan fiduciaries who have undisclosed inside information can avoid a securities violation by "publicly disclosing the inside information" to protect plan participants. U.S. Invitation Br. 12. That offhand suggestion does not withstand scrutiny. Not only would it impose heightened disclosure requirements on ERISA fiduciaries, but it ignores the possibility that public statements about the employer's financial state, made by ERISA fiduciaries, may be based on incomplete information and contrary to disclosures made by company officials tasked with the responsibility to provide the markets with such information.[6] Moreover, putting ERISA fiduciaries to the task of disclosures greater than those required by the statute itself ignores the possibility that ERISA fiduciaries providing incomplete information could

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[6] While barring plan participants from further purchases of company stock based upon adverse non public information might not violate the securities laws, it would certainly send a signal—perhaps an erroneous one—regarding the future prospects of the company, potentially contributing to the very losses that the fiduciaries intended to prevent.

lead to overcorrection in the market, thereby harming the plan participants the fiduciary is charged with protecting.[7]

For all of these reasons, the presumption of prudence standard plays an essential role in clarifying for ERISA fiduciaries and their advisers both when the fiduciaries are required to depart from plan terms, and when they can be held liable for failing to do so. It is consistent with ERISA, is essential to the continued operation and availability of company stock investment options, and should be adopted by this Court.

II. The Presumption Of Prudence Standard Is Appropriately Applied At The Pleading Stage

The Sixth Circuit's refusal to apply the presumption of prudence standard at the pleading stage is tantamount to depriving ERISA fiduciaries of the benefits of the presumption and is inconsistent with this Court's precedents.

A. A Fiduciary-Breach Plaintiff Must Allege Facts That, If Proved, Would Establish Liability

This Court has established that a claim must have facial plausibility to survive a motion to dismiss, meaning that "the plaintiff [must] plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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[7] ERISA fiduciaries are subject to limited disclosure obligations, including a duty to furnish to participants a summary plan description, *see* 29 U.S.C. § 1102(a)(1), and a duty to disclose specified financial information in annual reports filed with the Secretary of Labor and made available to plan participants upon request, *see id.* §§ 1023(b), 1024(b).

misconduct allowed." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). To satisfy this standard, a plaintiff must include allegations to support every element of his claim and must provide "more than labels and conclusions, [or] a formulaic recitation" of a cause of action's elements. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

This Court has observed that requiring plaintiffs to allege plausible grounds for providing relief at the pleading stage serves the practical purpose of preventing a plaintiff "with a largely groundless claim" from "tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 558 (internal quotation marks omitted). It has further cautioned that, when the allegations in a complaint do not give rise to a plausible claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Ibid.* (internal quotation marks omitted).

Here, a plaintiff can satisfy the plausibility standard only by alleging that the fiduciary acted imprudently. A conclusory assertion of "imprudence," however, will not suffice. *See Twombly*, 550 U.S. at 557. For that reason, a participant cannot plausibly allege imprudent conduct on the part of a plan fiduciary or service provider without knowing what it means to act imprudently in the specific circumstances at issue. In the company stock context, a fiduciary acts imprudently if it abuses its discretion by continuing to permit investment in company stock in obedience to the plan's directions despite a change in circumstances that would lead a reasonable fiduciary to conclude that the plan terms should no longer govern. The fiduciary's abuse of discretion is an

element of the claim that the fiduciary's decision was imprudent. *See Edgar*, 503 F.3d at 349 (observing that there is "no reason to allow [an ERISA stock-drop case] to proceed to discovery when, even if the allegations are proven true, [plaintiff] cannot establish that defendants abused their discretion") (footnote omitted). Accordingly, it must be alleged in the complaint.

The Second, Third, Fifth, Seventh, and Eleventh Circuits have recognized this reality and properly applied the presumption at the pleading stage. *See, e.g.*, *Kopp*, 722 F.3d at 339; *White*, 714 F.3d at 990-91; *Lanfear*, 679 F.3d at 1281; *Citigroup*, 662 F.3d at 139; *Edgar*, 503 F.3d at 359. In light of this consensus and the Court's precedents, this Court should do the same.

B. There Are Compelling Policy Reasons To Apply The Presumption Of Prudence Standard At The Pleading Stage

ERISA stock-drop cases are both abundant and expensive, and there has been no indication that their popularity among the plaintiffs' bar is waning. The majority of public companies provide an option to invest in company stock as part of their 401(k) offerings, and over one-third of the work force of these companies owns stock in their employers. *See* National Center for Employee Ownership, *A Brief Overview of Employee Ownership in the U.S.*, http://www.nceo.org/articles/employee-ownership-esop-united-states (last visited Feb. 3, 2014).

With the rise in company stock investment options, the incidence of ERISA litigation has ballooned. Between 1997 and June 30, 2013, more than 250 stock-drop cases were filed by participants in defined contribution plans. *See* App. B. Despite the

number of cases filed, in cases involving publicly offered securities, the plaintiffs have not obtained a single, final, litigated judgment in their favor. *See Securities Litigation: A Practitioner's Guide*, Practicing Law Institute, ch. 16:1 at 16-2 (Jonathan C. Dickey ed. 2012) ("PLI Treatise").

Defendants in these stock-drop cases face two significant problems at the outset. First, these cases are often brought, and frequently certified, as class actions (*see* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:5 (10th ed. 2013)), meaning the liability exposure is generally in the tens of millions of dollars.[8] Second, even when the suit is meritless, the underlying allegations go to the heart of the company's business operations. When faced with expensive litigation and discovery that is invasive, broad, and costly, defendants often have little choice but to settle a case regardless of its merits or lack thereof. *See, e.g.*, *Twombly*, 550 U.S. at 559 (noting, in a class action case, that "the threat of discovery expense [can] push cost-conscious defendants to settle even anemic cases"); *Hearings on Securities Litigation Reform Proposals S.240, S.667, and H.R. 1058 Before the Subcomm. on Sec. of the Comm. on Banking, Hous. & Urban Affairs*, 104th Cong. 49, 52 n.17 (1995) (statement of J. Carter Beese, Jr., Chairman, Capital Markets Regulatory Reform Project, Center for Strategic and International Studies) (observing that companies are often induced to settle even a meritless securities fraud case if it survives a motion to dismiss, as avoiding discovery alone can avoid approximately 80% of the costs of the action in some

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[8] The propriety of such certifications is not at issue in this case.

cases). These cost burdens cause detrimental ripple effects throughout the industry, unfairly burdening fiduciaries, plan advisers, and shareholders alike.

A survey of cases, settlements, and average settlement amounts before and after the recognition of the presumption of prudence standard in each circuit demonstrates the standard's utility in weeding out meritless litigation. Specifically, according to data collected by Cornerstone Research, the average settlement amount decreased from over $20 million to less than $5 million following the recognition of the presumption of prudence by the Second, Fifth, Seventh, Ninth, and Eleventh Circuits.[9]

U.S. Court of Appeals	Average Settlement Overall (Millions USD)	Date of Decision Recognizing Presumption of Prudence	Average Settlement Before Recognition (Millions USD)	Number of Settlements Before Recognition	Average Settlement After Recognition (Millions USD)	Number of Settlements After Recognition
First	15.5	n/a				
Second	26.2	10/19/11	29.5	19	4.6	3
Third	18.1	08/10/95	n/a	0	18.1	18
Fourth	4.6	n/a				
Fifth	34.9	04/25/08	50.3	7	8.0	4
Sixth	14.4	10/04/95	n/a	0	14.4	23
Seventh	10.1	04/19/13	10.1	13	n/a	0
Eighth	4.5	n/a				
Ninth	15.0	09/30/10	20.3	14	4.4	7
Tenth	19.9	n/a				
Eleventh	7.3	05/08/12	10.0	7	2.4	4
DC	4.1	n/a				

The Sixth Circuit's refusal to apply the presumption of prudence at the pleading stage exposes fiduciaries and service providers to meritless litigation and significant expenditures that may ultimately dis-

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[9] Many factors play a role in the decision whether to settle a case and, if so, in what amount. While there may not be enough examples to draw any statistically significant conclusion, the decrease in both the number of settlements and the average amount of the settlements after the various circuit courts recognized the presumption is nonetheless telling as to the effect the presumption has had in weeding out meritless cases.

courage employers from providing opportunities to own employer stock. Indeed, in the Sixth Circuit, there have been 23 ERISA stock-drop settlements since the presumption was recognized in 1995, the largest number of any of the circuits, with an average settlement amount of $14.4 million.

The decision below also ignores the fact that plan participants often have alternative avenues of relief via the securities laws, which must be read in *pari materia* with ERISA. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (statutes must be read to create coherent and symmetrical statutory scheme); *see also* 29 U.S.C. § 1144(d) (providing that nothing in Title I "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law"). In particular, where plaintiffs allege that a fiduciary has knowingly permitted continued investment in artificially inflated company stock, an ERISA stock-drop suit will often resemble a securities suit and may be resolved through securities litigation. *See* PLI Treatise, ch. 16:4.2 at 16-35–36).

In addition, ERISA stock-drop cases are frequently accompanied by securities fraud suits. *See* PLI Treatise, ch. 16:2) at 16-4. Indeed, the overlap between ERISA and the securities laws counsels in favor of applying the presumption of prudence at the pleading stage to discourage plaintiffs from using ERISA to disguise securities claims and circumvent the procedural hurdles associated with the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. These hurdles include heightened pleading standards, an automatic stay on discovery, and a heavily structured lead plaintiff appointment process. By making it easier to

allege a plausible ERISA imprudence claim, the Sixth Circuit's decision could very well undermine the PSLRA's procedural hurdles and prompt more securities litigation under a thin veneer of ERISA fiduciary-breach liability. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) (acknowledging "the danger of vexatious [securities] litigation which could result from a widely expanded class of plaintiffs"). Only cases in which the plaintiffs can plausibly plead an actionable violation of ERISA's substantive standards should expose defendants to such costly litigation.

For all of these reasons, the presumption of prudence standard is appropriately applied at the pleading stage.

* * *

Affirmance of the Sixth Circuit's ruling would undermine ERISA's statutory scheme and Congress's longstanding support for employee ownership of company stock. It would force ERISA fiduciaries charged with offering company stock as an investment option onto a tightrope between the duty to comply with the terms of the plan and a duty to second-guess those terms whenever the stock price declines. In contrast, reversing the decision below and making clear that, as every other court of appeals to have considered similar issues has recognized, the presumption of prudence standard provides a standard of primary conduct and must be applied at the pleading stage would strike the proper balance between the fiduciary's statutory responsibilities to follow the terms of the plan and protect the interests of plan participants.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted.

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

MARK A. PERRY
Counsel of Record
PAUL BLANKENSTEIN
ASHLEY S. BOIZELLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amicus Curiae
SIFMA

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APPENDIX

APPENDIX A

26 U.S.C. § 402 provides in relevant part:

§ 402. Taxability of beneficiary of employees' trust

* * *

(e) Other rules applicable to exempt trusts

* * *

(4) Net unrealized appreciation

(A) Amounts attributable to employee contributions

For purposes of subsection (a) and section 72, in the case of a distribution other than a lump sum distribution, the amount actually distributed to any distributee from a trust described in subsection (a) shall not include any net unrealized appreciation in securities of the employer corporation attributable to amounts contributed by the employee (other than deductible employee contributions within the meaning of section 72(o)(5)). This subparagraph shall not apply to a distribution to which subsection (c) applies.

(B) Amounts attributable to employer contributions

For purposes of subsection (a) and section 72, in the case of any lump sum distribution which includes securities of the employer corporation, there shall be excluded from gross income the net unrealized appreciation attributable to that part of the distribution which consists of securities of the employer corporation. In accordance with rules prescribed by the Secretary, a taxpayer may elect, on the return of tax on which a lump sum distribution is required to be included, not

to have this subparagraph apply to such distribution.

(C) Determination of amounts and adjustments

For purposes of subparagraphs (A) and (B), net unrealized appreciation and the resulting adjustments to basis shall be determined in accordance with regulations prescribed by the Secretary.

(D) Lump-sum distribution

For purposes of this paragraph—

(i) In general

The term "lump-sum distribution" means the distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient—

(I) on account of the employee's death,

(II) after the employee attains age 59 1/2,

(III) on account of the employee's separation from service, or

(IV) after the employee has become disabled (within the meaning of section 72(m)(7)),

from a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501 or from a plan described in section 403(a). Subclause (III) of this clause shall be applied only with respect to an individual who is an employee without regard to section 401(c)(1), and subclause (IV) shall be applied only with respect to an employee within the meaning of section

401(c)(1). For purposes of this clause, a distribution to two or more trusts shall be treated as a distribution to one recipient. For purposes of this paragraph, the balance to the credit of the employee does not include the accumulated deductible employee contributions under the plan (within the meaning of section 72(o)(5)).

(ii) Aggregation of certain trusts and plans

For purposes of determining the balance to the credit of an employee under clause (i)—

(I) all trusts which are part of a plan shall be treated as a single trust, all pension plans maintained by the employer shall be treated as a single plan, all profit-sharing plans maintained by the employer shall be treated as a single plan, and all stock bonus plans maintained by the employer shall be treated as a single plan, and

(II) trusts which are not qualified trusts under section 401(a) and annuity contracts which do not satisfy the requirements of section 404(a)(2) shall not be taken into account.

(iii) Community property laws

The provisions of this paragraph shall be applied without regard to community property laws.

(iv) Amounts subject to penalty

This paragraph shall not apply to amounts described in subparagraph (A) of section 72(m)(5) to the extent that section 72(m)(5) applies to such amounts.

(v) Balance to credit of employee not to include amounts payable under qualified domestic relations order

For purposes of this paragraph, the balance to the credit of an employee shall not include any amount payable to an alternate payee under a qualified domestic relations order (within the meaning of section 414(p)).

(vi) Transfers to cost-of-living arrangement not treated as distribution

For purposes of this paragraph, the balance to the credit of an employee under a defined contribution plan shall not include any amount transferred from such defined contribution plan to a qualified cost-of-living arrangement (within the meaning of section 415(k)(2)) under a defined benefit plan.

(vii) Lump-sum distributions of alternate payees

If any distribution or payment of the balance to the credit of an employee would be treated as a lump-sum distribution, then, for purposes of this paragraph, the payment under a qualified domestic relations order (within the meaning of section 414(p)) of the balance to the credit of an alternate payee who is the spouse or former spouse of the employee shall be treated as a lump-sum distribution. For purposes of this clause, the balance to the credit of the alternate payee shall not include any amount payable to the employee.

(E) Definitions relating to securities

For purposes of this paragraph—

(i) Securities

The term "securities" means only shares of stock and bonds or debentures issued by a corporation with interest coupons or in registered form.

(ii) Securities of the employer

The term "securities of the employer corporation" includes securities of a parent or subsidiary corporation (as defined in subsections (e) and (f) of section 424) of the employer corporation.

* * *

26 U.S.C. § 404 provides in relevant part:

§ 404. Deduction for contributions of an employer to an employees' trust or annuity plan and compensation under a deferred-payment plan

* * *

(k) Deduction for dividends paid on certain employer securities

(1) General rule

In the case of a C corporation, there shall be allowed as a deduction for a taxable year the amount of any applicable dividend paid in cash by such corporation with respect to applicable employer securities. Such deduction shall be in addition to the deductions allowed under subsection (a).

(2) Applicable dividend

For purposes of this subsection—

(A) In general

The term "applicable dividend" means any dividend which, in accordance with the plan provisions—

(i) is paid in cash to the participants in the plan or their beneficiaries,

(ii) is paid to the plan and is distributed in cash to participants in the plan or their beneficiaries not later than 90 days after the close of the plan year in which paid,

(iii) is, at the election of such participants or their beneficiaries—

(I) payable as provided in clause (i) or (ii), or

(II) paid to the plan and reinvested in qualifying employer securities, or

(iv) is used to make payments on a loan described in subsection (a)(9) the proceeds of which were used to acquire the employer securities (whether or not allocated to participants) with respect to which the dividend is paid.

(B) Limitation on certain dividends

A dividend described in subparagraph (A)(iv) which is paid with respect to any employer security which is allocated to a participant shall not be treated as an applicable dividend unless the plan provides that employer securities with a fair market value of not less than the amount of such dividend are allocated to such participant for the year which (but for subparagraph (A)) such dividend would have been allocated to such participant.

(3) Applicable employer securities

For purposes of this subsection, the term "applicable employer securities" means, with respect to any dividend, employer securities which are held on the record date for such dividend by an employee stock ownership plan which is maintained by—

(A) the corporation paying such dividend, or

(B) any other corporation which is a member of a controlled group of corporations (within the meaning of section 409(l)(4)) which includes such corporation.

(4) Time for deduction

(A) In general

The deduction under paragraph (1) shall be allowable in the taxable year of the corporation in which the dividend is paid or distributed to a participant or his beneficiary.

(B) Reinvestment dividends

For purposes of subparagraph (A), an applicable dividend reinvested pursuant to clause (iii)(II) of paragraph (2)(A) shall be treated as paid in the taxable year of the corporation in which such dividend is reinvested in qualifying employer securities or in which the election under clause (iii) of paragraph (2)(A) is made, whichever is later.

(C) Repayment of loans

In the case of an applicable dividend described in clause (iv) of paragraph (2)(A), the deduction under paragraph (1) shall be allowable in the taxable year of the corporation in which such dividend is used to repay the loan described in such clause.

(5) Other rules

For purposes of this subsection—

(A) Disallowance of deduction

The Secretary may disallow the deduction under paragraph (1) for any dividend if the Secretary determines that such dividend constitutes, in substance, an avoidance or evasion of taxation.

(B) Plan qualification

A plan shall not be treated as violating the requirements of section 401, 409, or 4975(e)(7), or as engaging in a prohibited transaction for purposes of section 4975(d)(3), merely by reason of any payment or distribution described in paragraph (2)(A).

(6) Definitions

For purposes of this subsection—

(A) Employer securities

The term "employer securities" has the meaning given such term by section 409(l).

(B) Employee stock ownership plan

The term "employee stock ownership plan" has the meaning given such term by section 4975(e)(7). Such term includes a tax credit employee stock ownership plan (as defined in section 409).

(7) Full vesting

In accordance with section 411, an applicable dividend described in clause (iii)(II) of paragraph (2)(A) shall be subject to the requirements of section 411(a)(1).

* * *

26 U.S.C. § 1042 provides:

§ 1042. Sales of stock to employee stock ownership plans or certain cooperatives

(a) Nonrecognition of gain

If—

(1) the taxpayer or executor elects in such form as the Secretary may prescribe the application of this section with respect to any sale of qualified securities,

(2) the taxpayer purchases qualified replacement property within the replacement period, and

(3) the requirements of subsection (b) are met with respect to such sale,

then the gain (if any) on such sale which would be recognized as long-term capital gain shall be recognized only to the extent that the amount realized on such sale exceeds the cost to the taxpayer of such qualified replacement property.

(b) Requirements to qualify for nonrecognition

A sale of qualified securities meets the requirements of this subsection if—

(1) Sale to employee organizations.--The qualified securities are sold to—

(A) an employee stock ownership plan (as defined in section 4975(e)(7)), or

(B) an eligible worker-owned cooperative.

(2) Plan must hold 30 percent of stock after sale

The plan or cooperative referred to in paragraph (1) owns (after application of section 318(a)(4)), immediately after the sale, at least 30 percent of—

(A) each class of outstanding stock of the corporation (other than stock described in section

1504(a)(4)) which issued the qualified securities, or

(B) the total value of all outstanding stock of the corporation (other than stock described in section 1504(a)(4)).

(3) Written statement required

(A) In general

The taxpayer files with the Secretary the written statement described in subparagraph (B).

(B) Statement

A statement is described in this subparagraph if it is a verified written statement of—

(i) the employer whose employees are covered by the plan described in paragraph (1), or

(ii) any authorized officer of the cooperative described in paragraph (1),

consenting to the application of sections 4978 and 4979A with respect to such employer or cooperative.

(4) 3-year holding period

The taxpayer's holding period with respect to the qualified securities is at least 3 years (determined as of the time of the sale).

(c) Definitions; special rules

For purposes of this section—

(1) Qualified securities

The term "qualified securities" means employer securities (as defined in section 409(*l*)) which—

(A) are issued by a domestic C corporation that has no stock outstanding that is readily tradable on an established securities market, and

(B) were not received by the taxpayer in—

(i) a distribution from a plan described in section 401(a), or

(ii) a transfer pursuant to an option or other right to acquire stock to which section 83, 422, or 423 applied (or to which section 422 or 424 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) applied).

(2) Eligible worker-owned cooperative

The term "eligible worker-owned cooperative" means any organization—

(A) to which part I of subchapter T applies,

(B) a majority of the membership of which is composed of employees of such organization,

(C) a majority of the voting stock of which is owned by members,

(D) a majority of the board of directors of which is elected by the members on the basis of 1 person 1 vote, and

(E) a majority of the allocated earnings and losses of which are allocated to members on the basis of—

(i) patronage,

(ii) capital contributions, or

(iii) some combination of clauses (i) and (ii).

(3) Replacement period

The term "replacement period" means the period which begins 3 months before the date on which the sale of qualified securities occurs and which ends 12 months after the date of such sale.

(4) Qualified replacement property

(A) In general

The term "qualified replacement property" means any security issued by a domestic operating corporation which—

(i) did not, for the taxable year preceding the taxable year in which such security was purchased, have passive investment income (as defined in section 1362(d)(3)(C)) in excess of 25 percent of the gross receipts of such corporation for such preceding taxable year, and

(ii) is not the corporation which issued the qualified securities which such security is replacing or a member of the same controlled group of corporations (within the meaning of section 1563(a)(1)) as such corporation.

For purposes of clause (i), income which is described in section 954(c)(3) (as in effect immediately before the Tax Reform Act of 1986) shall not be treated as passive investment income.

(B) Operating corporation

For purposes of this paragraph—

(i) In general

The term "operating corporation" means a corporation more than 50 percent of the assets of which were, at the time the security was purchased or before the close of the re-

placement period, used in the active conduct of the trade or business.

(ii) Financial institutions and insurance companies

The term "operating corporation" shall include—

(I) any financial institution described in section 581, and

(II) an insurance company subject to tax under subchapter L.

(C) Controlling and controlled corporations treated as 1 corporation

(i) In general

For purposes of applying this paragraph, if—

(I) the corporation issuing the security owns stock representing control of 1 or more other corporations,

(II) 1 or more other corporations own stock representing control of the corporation issuing the security, or

(III) both,

then all such corporations shall be treated as 1 corporation.

(ii) Control

For purposes of clause (i), the term "control" has the meaning given such term by section 304(c). In determining control, there shall be disregarded any qualified replacement property of the taxpayer with respect to the section 1042 sale being tested.

(D) Security defined.--For purposes of this paragraph, the term "security" has the meaning given such term by section 165(g)(2), except that such term shall not include any security issued by a government or political subdivision thereof.

(5) Securities sold by underwriter

No sale of securities by an underwriter to an employee stock ownership plan or eligible worker-owned cooperative in the ordinary course of his trade or business as an underwriter, whether or not guaranteed, shall be treated as a sale for purposes of subsection (a).

(6) Time for filing election

An election under subsection (a) shall be filed not later than the last day prescribed by law (including extensions thereof) for filing the return of tax imposed by this chapter for the taxable year in which the sale occurs.

(7) Section not to apply to gain of C corporation

Subsection (a) shall not apply to any gain on the sale of any qualified securities which is includible in the gross income of any C corporation.

(d) Basis of qualified replacement property

The basis of the taxpayer in qualified replacement property purchased by the taxpayer during the replacement period shall be reduced by the amount of gain not recognized by reason of such purchase and the application of subsection (a). If more than one item of qualified replacement property is purchased, the basis of each of such items shall be reduced by an amount determined by multiplying the total gain not recognized by reason of such purchase and the application of subsection (a) by a fraction—

(1) the numerator of which is the cost of such item of property, and

(2) the denominator of which is the total cost of all such items of property.

Any reduction in basis under this subsection shall not be taken into account for purposes of section 1278(a)(2)(A)(ii) (relating to definition of market discount).

(e) Recapture of gain on disposition of qualified replacement property

(1) In general

If a taxpayer disposes of any qualified replacement property, then, notwithstanding any other provision of this title, gain (if any) shall be recognized to the extent of the gain which was not recognized under subsection (a) by reason of the acquisition by such taxpayer of such qualified replacement property.

(2) Special rule for corporations controlled by the taxpayer

If—

(A) a corporation issuing qualified replacement property disposes of a substantial portion of its assets other than in the ordinary course of its trade or business, and

(B) any taxpayer owning stock representing control (within the meaning of section 304(c)) of such corporation at the time of such disposition holds any qualified replacement property of such corporation at such time,

then the taxpayer shall be treated as having disposed of such qualified replacement property at such time.

(3) Recapture not to apply in certain cases

Paragraph (1) shall not apply to any transfer of qualified replacement property—

(A) in any reorganization (within the meaning of section 368) unless the person making the election under subsection (a)(1) owns stock representing control in the acquiring or acquired corporation and such property is substituted basis property in the hands of the transferee,

(B) by reason of the death of the person making such election,

(C) by gift, or

(D) in any transaction to which section 1042(a) applies.

(f) Statute of limitations

If any gain is realized by the taxpayer on the sale or exchange of any qualified securities and there is in effect an election under subsection (a) with respect to such gain, then—

(1) the statutory period for the assessment of any deficiency with respect to such gain shall not expire before the expiration of 3 years from the date the Secretary is notified by the taxpayer (in such manner as the Secretary may by regulations prescribe) of—

(A) the taxpayer's cost of purchasing qualified replacement property which the taxpayer claims results in nonrecognition of any part of such gain,

(B) the taxpayer's intention not to purchase qualified replacement property within the replacement period, or

(C) a failure to make such purchase within the replacement period, and

(2) such deficiency may be assessed before the expiration of such 3-year period notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment.

(g) Application of section to sales of stock in agricultural refiners and processors to eligible farm cooperatives

(1) In general

This section shall apply to the sale of stock of a qualified refiner or processor to an eligible farmers' cooperative.

(2) Qualified refiner or processor.--For purposes of this subsection, the term 'qualified refiner or processor' means a domestic corporation—

(A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and

(B) which, during the 1-year period ending on the date of the sale, purchases more than one-half of such products to be refined or processed from—

(i) farmers who make up the eligible farmers' cooperative which is purchasing stock in the corporation in a transaction to which this subsection is to apply, or

(ii) such cooperative.

(3) Eligible farmers' cooperative

For purposes of this section, the term 'eligible farmers' cooperative' means an organization to which part I of subchapter T applies and which is engaged in the marketing of agricultural or horticultural products.

(4) Special rules

In applying this section to a sale to which paragraph (1) applies—

(A) the eligible farmers' cooperative shall be treated in the same manner as a cooperative described in subsection (b)(1)(B),

(B) subsection (b)(2) shall be applied by substituting '100 percent' for '30 percent' each place it appears,

(C) the determination as to whether any stock in the domestic corporation is a qualified security shall be made without regard to whether the stock is an employer security or to subsection (c)(1)(A), and

(D) paragraphs (2)(D) and (7) of subsection (c) shall not apply.

APPENDIX B

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
1.	Blyler, et al. v. Agee, et al.	Morrison Knudsen Corp	Jul-97
2.	Landgraff v. Columbia/HCA Healthcare Corporation of America, et al.	Columbia/HCA Healthcare Corporation of America	Nov-97
3.	Doris Presley and Denis Kearney v. Carter Hawley Hale Profit Sharing Plan, et al.	Carter Hawley Hale Stores, Inc.	Nov-97
4.	In re IKON Office Solutions, Inc., Securities Litigation	IKON Office Solutions	Feb-98
5.	Koch v. Dwyer et al.	EMCOR Group	Jul-98
6.	David Croucher, et al., v. Midcon Corp. Employee Stock Ownership Plan Administrative Committee, et al.	Occidental Petroleum Corporation	Dec-98

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
7.	Chang, et al. v. McKesson HBOC, Inc., et al.	McKesson HBOC, Inc.	Nov-99
8.	Hull v. Policy Management Systems Corporation et al.	Policy Management Systems Corporation	Mar-00
9.	Wright et al. v. Oregon Metallurgical Corporation et al.	Oregon Metallurgical Corporation	Mar-01
10.	Kolar, et al. v. Rite Aid Corporation, et al.	Rite Aid Corporation	Mar-01
11.	Stein, et al. v. Smith, et al.	Stone & Webster, Incorporated	Mar-01
12.	Reinhart, et al. v. Lucent Technologies, et al.; Dane v. Lucent Pension and B, et al.	Lucent Technologies, Inc.	Jul-01
13.	Markley et al. v. Retirement Committee of Armstrong World Industries, Inc. et al.	Armstrong World Industries, Inc.	Aug-01

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
14.	Kling v. Fidelity Management, et al.	Harnischfeger Industries, Inc.	Nov-01
15.	Tittle, et al. v. Enron Corp, et al.	Enron Corp.	Nov-01
16.	In re Providian Financial Corp. ERISA Litigation	Providian Financial Corporation	Dec-01
17.	In Re Nortel Networks Corp. "ERISA" Litigation	Nortel Networks Corporation	Dec-01
18.	Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust, Ann Angleopoulos, Joyce Freeman, and Henry Duncan Kirkley, on behalf of Themselves and Others Similarly Situated v. Hanover Compressor Company, et al.	Hanover Compressor Company	Feb-02

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
19.	In Re: Williams Companies ERISA Litigation	Williams Companies, Inc.	Feb-02
20.	In Re Qwest Savings and Retirement Plan ERISA Litigation	Qwest Communications International, Inc.	Mar-02
21.	Quincie Rankin, et al. v. David P. Rots, et al.	Kmart Corp.	Mar-02
22.	Nelson, et al. v. Ipalco Enterprises, Inc., et al.	IPALCO Enterprises, Inc.	Mar-02
23.	Crowley v. Corning, Inc., et al.	Corning, Inc.	Apr-02
24.	Harris, et al. v. Koenig, et al.	Waste Management	Apr-02
25.	ADC Telecomms., Inc. ERISA Litigation	ADC Telecomms., Inc.	May-02

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
26.	Kirschbaum v. Reliant Energy Inc., et al.	Reliant Energy, Inc.	May-02
27.	In Re WorldCom, Inc. ERISA Litigation	WorldCom, Inc.	Jun-02
28.	In Re Xerox Corporation ERISA Litigation	Xerox Corporation	Jul-02
29.	In re CMS Energy ERISA Litigation	CMS Energy	Jul-02
30.	Matthews v. Duke Energy, et al.	Duke Energy Corporation	Jul-02
31.	In re Tyco International, Ltd., Securities, Derivative and 'ERISA' Litigation	Tyco International Ltd.	Jul-02
32.	Lalonde v. Textron, Inc., et al.	Textron Inc.	Jul-02

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
33.	Darlington v. Tull et al.	Louisiana-Pacific Corporation	Jul-02
34.	In Re: Dynegy Inc. ERISA v. , et al.	Dynegy, Inc. (2002)	Aug-02
35.	In Re BellSouth Corporation ERISA Litigation	BellSouth Corporation	Sep-02
36.	Buckingham, et al. v. Touch America, et al. (In Re Touch America Holdings, Inc. ERISA Litigation)	Montana Power Company	Sep-02
37.	In Re: Global Crossing, Ltd. ERISA litigation	Global Crossing Ltd.	Sep-02
38.	Donald Newcome, et al. v. Xcel Energy Inc, et al.	Xcel Energy, Inc.	Sep-02
39.	Russell v. Conseco, Inc. et al.	Conseco, Inc.	Oct-02

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
40.	Langbecker, et al. v. Electronic Data Systems, et al.	Electronic Data Systems Corporation	Oct-02
41.	Cokenour v. Household Int'l Inc., et al.	Household International, Inc.	Nov-02
42.	In Re: AOL Time Warner ERISA v. , et al.	Time Warner Inc.	Nov-02
43.	Furstenau et al. v. AT&T Corp et al.	AT&T Corporation	Nov-02
44.	Kehr v. Sears Roebuck & Co., et al.	Sears Roebuck & Co.	Nov-02
45.	In re Broadwing, Inc. ERISA Litigation	Broadwing	Nov-02
46.	Hargrave v. TXU Corp, et al.	TXU Corp.	Nov-02

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
47.	King v. Computer Associates Intl. Inc. et al.	Computer Associates International Inc.	Nov-02
48.	In Re AEP ERISA Litigation	American Electric Power Company, Inc.	Dec-02
49.	Pennsylvania Federation, Brotherhood of Maintenance of Way Employees et al. v. Norfolk Southern Corporation et al.	Norfolk Southern Corporation	Dec-02
50.	William H. Lewis, III v. El Paso Corporation, et al.	El Paso	Dec-02
51.	In re: Bristol-Myers Squibb Co. ERISA Litigation	Bristol-Myers Squibb Company	Dec-02
52.	Huntsman v. CIGNA Corporation et al.	Cigna Corporation	Feb-03
53.	Summers, et al. v. UAL Corp Empl Stock, et al.	UAL Corporation	Feb-03

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
54.	In Re Westar Energy Inc. ERISA Litigation	Westar Energy Inc.	Mar-03
55.	In Re: Ramseyer, et al. v. Honeywell International, et al.	Honeywell International Inc.	Mar-03
56.	In re Royal Ahold N.V. Securities and ERISA Litigation	Royal Ahold, N.V.	Mar-03
57.	Zhu, et al. v. Schering Plough Corp, et al. (In Re Schering-Plough Corporation ERISA Litigation)	Schering-Plough Corporation	Mar-03
58.	Sharon Keesecker, on behalf of herself and all others similarly situated vs. Allegheny Energy, Inc. and Richard J. Gagliardi and Unknown Fiduciary Defendents 1-100	Allegheny Energy, Inc.	Mar-03
59.	In Re: HealthSouth ERISA, et al. v. Master Docket, et al.	HealthSouth Corp.	Apr-03

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
60.	Carol Pilkington v. Cardinal Health Inc., et al.	Syncor International Corporation	Apr-03
61.	Phelps v. Calpine Corporation et al.	Calpine Corporation	Apr-03
62.	IN RE Mirant Corporation ERISA Litigation	Mirant Corporation	Apr-03
63.	In Re Sprint Corporation ERISA Litigation	Sprint Corporation	Apr-03
64.	Gee v. Unumprovident Corp., et al.	UnumProvident Corporation	Apr-03
65.	Fisher, et al. v. JP Morgan Chase and Co.	JPMorgan Chase & Co.	May-03
66.	In Re Raytheon ERISA Litigation	Raytheon Company	May-03

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
67.	Martin Falk v. Amerada Hess Corporation, et al.	Amerada Hess Corporation	May-03
68.	Howell v. Koenemann, et al.	Motorola, Inc.	Jul-03
69.	Scopone v. King Pharmaceuticals, et al.	King Pharmaceuticals Inc.	Aug-03
70.	Agway Inc. Employees' 401(k) Thrift Investment Plan ERISA Litigation	Agway, Inc.	Aug-03
71.	In Re Freddie Mac ERISA Litigation	Federal Home Loan Mortgage Corporation	Aug-03
72.	Sherrill et al. v. Federal-Mogul Corporation Retirement Programs Committee et al.	Federal-Mogul Corporation	Sep-03
73.	Craig Wangberger et al. v. Janus Capital Group Inc. and Plan Advisory Committee	Janus Capital Group Inc.	Oct-03

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
74.	Pettit et al. v. JDS Uniphase Corporation et al.	JDS Uniphase Corporation	Oct-03
75.	In Re: Polaroid ERISA Litigation	Polaroid Corp	Oct-03
76.	In Re: The Goodyear Tire & Rubber Company ERISA Litigation	Goodyear Tire & Rubber Co.	Oct-03
77.	O'Roarke et al. v. Loral Space and Communications Ltd. Savings Plan Administrative Committee	Loral Space & Communications Inc.	Dec-03
78.	In re: Winn-Dixie Stores, Inc. ERISA Litigation	Winn-Dixie Stores, Inc.	Mar-04
79.	Lancaster v. Royal Dutch Petroleum Company et al.	Royal Dutch Petroleum Company	Mar-04

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
80.	William R. Martin, On Behalf of Himself and All Others Similarly Situated vs. AAIPharma Inc., Circle Trust Company, Invesmart Advisors Inc., William L. Ginna, and John Does Nos. 1-100	AAIPharma Inc.	Apr-04
81.	Wendy Reichert, individually and on behalf of all others similarly situated, v. SPX Corporation, et al.	SPX Corporation	Apr-04
82.	Evans v. Akers et al.	W.R. Grace	Jun-04
83.	Woods v. Southern Company, et al.	Southern Company	Jun-04
84.	In re Cardinal Health ERISA Litigation	Cardinal Health, Inc.	Jul-04

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
85.	Vincent D. DiFelice v. US Airways, Inc. and Fidelity Management Trust Company	US Airways Group, Inc.	Jul-04
86.	Smith v. Delta Air Lines, Inc. et al.	Delta Air Lines, Inc.	Sep-04
87.	Itteilag v. Aquila, Inc. et al. [In Re Aquila ERISA Litigation]	Aquila, Inc.	Sep-04
88.	In Re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation	Merck & Co., Inc.	Oct-04
89.	Rogers v. Baxter Intl. Inc., et al.	Baxter International Inc.	Oct-04
90.	Dickerson v. Feldman, et al.	Solutia Inc.	Oct-04
91.	In re: Fannie Mae ERISA Litigation	Fannie Mae	Oct-04

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
92.	In Re Marsh ERISA Litigation	Marsh & McLennan Companies, Inc.	Oct-04
93.	Thomas v. McCourt et al.	RCN Corp.	Oct-04
94.	Spear v. Hartford Financial Svcs Group Inc. et al.	Hartford Financial Services Group, Inc.	Oct-04
95.	Smith v. Aon Corporation, et al.	Aon Corporation	Oct-04
96.	Fescina v. CVS Corporation et al.	CVS Corporation	Oct-04
97.	In Re Metlife Inc. ERISA Litigation	MetLife Inc.	Nov-04
98.	Caltagirone v. New York Community Bancorp Inc. et al.	New York Community Bancorp, Inc.	Nov-04

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
99.	In re ERISA Litigation	American International Group, Inc.	Nov-04
100.	Curry v. ITT Educational Services, Inc. et al.	ITT Educational Services, Inc.	Dec-04
101.	In Re Pfizer ERISA Litigation	Pfizer Inc.	Dec-04
102.	Spiziri v. The St. Paul Travelers Companies, Inc., et al.	St. Paul Travelers Companies, Inc.	Dec-04
103.	Shirk and Jauss v. Fifth Third Bancorp et al.	Fifth Third Bancorp	Jan-05
104.	Lively, et al. v. Dynegy, Inc., et al.	Dynegy, Inc. (Dynegy Midwest Generation, Inc.)	Jan-05
105.	Howard Graden v. Conexant Systems Inc.	Conexant Systems, Inc.	Feb-05

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
106.	NOA et al. v. KEYSER et al.	Trump Hotel & Casino Resorts, Inc.	Feb-05
107.	In re Tower Automotive ERISA Litigation	Tower Automotive	Feb-05
108.	Smith v. Krispy Kreme Doughnut Corporation et al.	Krispy Kreme Doughnut Corporation	Mar-05
109.	In Re Delphi Corporation Securities, Derivative & "ERISA" Litigation	Delphi Corp	Mar-05
110.	Pyrka et al. v. General Motors Corporation et al.	General Motors Corp.	Mar-05
111.	In Re Visteon Corp. ERISA Litigation	Visteon Corp.	Mar-05

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112.	Shamery et al. v. The Coca-Cola Company et al.; Jackson v. The Coca-Cola Company et al.; Pedraza v. The Coca-Cola Company et al.	Coca Cola Company	May-05
113.	Murray et al. v. The Tribune Company et al.	Tribune Company	May-05
114.	Ronald Dancer v. Avery Dennison Corporation et al.	Avery Dennison	May-05
115.	Curtis R. Mellot v. ChoicePoint Inc., et al.	ChoicePoint Inc.	May-05
116.	Jon Mark Duquette v. Ferro Corporation, Anne M. Granchi, James C. Bays, Thomas M. Gannon, Patricia J. Stilwell, and John Does 1-30	Ferro Corp.	Jun-05
117.	In re Rhodia Inc. ERISA litigation	Rhodia Inc.	Jun-05

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
118.	Cannon et al. v. MBNA Corporation et al.	MBNA Corporation	Jun-05
119.	Harzewski v. Guidant Corporation, et al.	Guidant Corporation	Jul-05
120.	Bright v. Conagra Foods Inc., et al.	Conagra Foods Inc.	Jul-05
121.	Edgar v. Avaya, Inc., et al.	Avaya, Inc.	Jul-05
122.	Phillips v. Molson Coors Brewing Company et al.	Molson Coors Brewing Company	Aug-05
123.	Bosman v. Harley-Davidson Inc. et al.	Harley-Davidson, Inc.	Aug-05
124.	In Re Avon Products Securities Litigation	Avon Products, Inc.	Oct-05

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
125.	Dolliver v. Patterson Companies, Inc., et al.	Patterson Companies, Inc.	Oct-05
126.	Johnson v. Dana Corporation, et al.	Dana Corporation	Nov-05
127.	Corthon v. Viacom, Inc. et al.	Viacom, Inc.	Nov-05
128.	Thurman v. HCA, Inc. et al.	HCA, Inc.	Nov-05
129.	Gary R. Shannahan, et al. v. Dynegy, Inc., et al.	Dynegy, Inc. (2006)	Jan-06
130.	Hochstadt et al. v. Boston Scientific Corporation et al.	Boston Scientific Corporation	Jan-06
131.	In re: Diebold ERISA Litigation	Diebold, Inc.	Jan-06

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132.	Umberto Cavalieri and Floyd Miklic v. General Electric Company et al.	General Electric Company	Mar-06
133.	Brieger v. Tellabs, Inc. et al.	Tellabs Operations, Inc.	Apr-06
134.	In Re Ford Motor Company ERISA Litigation	Ford Motor Company	Apr-06
135.	Cress et al. v. Wilson et al.	Northwest Airlines Corporation	Apr-06
136.	Ward v. Avaya, Inc. et al.	Avaya, Inc.	Apr-06
137.	Malloy v. Lear Corporation, et al.	Lear Corporation	Apr-06
138.	In re Bausch & Lomb, Inc. ERISA Litigation	Bausch & Lomb, Inc.	Apr-06

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139.	In Re Coca-Cola Enterprises, Inc., ERISA Litigation	Coca-Cola Enterprises, Inc.	Apr-06
140.	Vermeylen v. ProQuest Company, et al.	ProQuest Company	May-06
141.	Salvato v. Zale Corporation et al.	Zale Corporation	Jun-06
142.	Maxwell et al. v. RadioShack Corporation et al.	RadioShack Corp	Jun-06
143.	Lanfear v. Home Depot Inc., et al.	Home Depot Inc.	Jun-06
144.	Quan, Gray, Ballard, Shamaly v. Computer Sciences Corp. et al.	Computer Sciences Corporation	Aug-06
145.	In re Affiliated Computer Systems ERISA Litigation	Affiliated Computer Services, Inc.	Aug-06

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
146.	Brown et al. v. Owens Corning Investment Review Committee et al.	Owens Corning	Sep-06
147.	Norman, et al. v. Dell, Inc., et al.	Dell, Inc.	Sep-06
148.	Thomas Fernandez, Lora Smith, Tosha Thomas et al. v. K-M Industries Holding Co., Inc. et al.	K-M Industries Holding	Nov-06
149.	Milton Lilly et al. v. Oneida Ltd. Employee Benefits Administrative Committee et al.	Oneida	Mar-07
150.	In re Fremont General Corporation Litigation	Fremont General Corporation	Apr-07
151.	In RE: Beazer Homes USA, Inc. ERISA Litigation	Beazer Homes USA, Inc.	Apr-07
152.	Reiff v. Metz, Jr. et al.	Solutia, Inc.	Jun-07

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
153.	Ingram v. Health Management Associates Inc. et al.	Health Management Associates, Inc.	Aug-07
154.	Vincent Alvidres, Individually and on Behalf of All Others Similarly Situated, v. Countrywide Financial Corporation, Henry G. Cisneros, Jeffrey M. Cunningham, Robert J. Donato, Michael E. Dougherty, Edwin Heller, Oscar P. Robertson, Harley W. Snyder, Marshall M. Gates, and John and Jane Does 1-20	Countrywide Financial Corporation	Sep-07
155.	Ebrahim Shannehchian et al. v. Macy's Inc. et al.	Macy's Inc.	Oct-07
156.	Gray v. Citigroup, Inc.	Citigroup Inc.	Nov-07

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157.	Esposito v. Merrill Lynch & Co., Inc. et al.	Merrill Lynch & Co., Inc.	Nov-07
158.	In Re: First American Corp. ERISA Litigation	First American Corporation	Nov-07
159.	Bushansky v. Washington Mutual Inc et al.	Washington Mutual, Inc.	Nov-07
160.	Carolyn Egan v. Morgan Stanley & Co. Incorporated, et al.	Morgan Stanley & Co. Incorporated (2007)	Dec-07

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
161.	Sharon Page v. Impac Mortgage Holdings, Inc., Joseph R. Tomkinson, William S. Ashmore, James Walsh, Frank P. Filipps, Stephan R. Peers, William E. Rose, Leigh J. Abrams, Gretchen D. Verdugo, Sheralee Urbano, The Impac Mortgage Holdings Inc. Employee Compensation and Benefits Committee, and Does 1 through 20	Impac Mortgage Holdings, Inc.	Dec-07
162.	Almonor v. BankAtlantic Bancorp, Inc. et al.	BankAtlantic Bancorp Inc.	Dec-07
163.	In re National City Corporation Securities, Derivative & ERISA Litigation	National City Corporation	Jan-08
164.	Moore v. Comcast Corporation et al.	Comcast Corporation	Feb-08

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
165.	Emanuel Schmalz, on Behalf of All Others Similarly Situated, v. Sovereign Bancorp, Inc., Joseph P. Campanelli, Mark R. McCollom, P. Michael Ehlerman, Brian Hard, Marian L. Heard, Gonzalo de Las Heras, Andrew C. Hove, Jr., Juan Rodriguez Inciarte, William J. Moran, Maria Fiorini Ramirez, Alberto Sanchez, Cameron C. Troilo, Sr., Ralph V. Hitworth, Retirement Savings Plan Committee of Sovereign Bancorp, Inc. And Compensation Committee Of Sovereign Bancorp, Inc.	Sovereign Bancorp	Feb-08
166.	Wilmer C. Massey vs. Comair Holdings, LLC et al.	Comair Holdings	Feb-08

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167.	Cedarleaf et al. v. Huntington Bancshares Inc. et al.	Huntington Bancshares, Inc.	Feb-08
168.	Herrera v. Wyeth et al.	Wyeth	Feb-08
169.	Terry Hamby, et al., v. Morgan Asset Management, et al.	Morgan Asset Management, Inc.	Mar-08
170.	Howard v. The Bear Stearns Companies, Inc. et al.	Bear Stearns Companies, Inc.	Mar-08
171.	In re Schering-Plough Corporation Enhance ERISA Litigation	Schering-Plough Corporation	Mar-08
172.	Paul West, et al., v. Wellpoint, In., et al.	WellPoint, Inc.	Apr-08
173.	Benitez et al. v. Humana, Inc. et al.	Humana Inc.	Apr-08

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174.	Cobb v. Merck & Co., Inc. et al.	Merck & Co., Inc. (2008)	Apr-08
175.	Morrison et al. v. Monegram International, Inc. et al.	MoneyGram International, Inc.	Apr-08
176.	In re: SLM Corp. ERISA Litigation	SLM Corp.	May-08
177.	Troy Sims v. First Horizon National Corporation et al.	First Horizon National Corporation	May-08
178.	Rinehart et al. v. Lehman Brothers Holdings, Inc. et al.	Lehman Brothers Holdings, Inc.	Jun-08
179.	In re American International Group, Inc. ERISA Litigation II	American International Group, Inc.	Jun-08
180.	In Re Wachovia Corporation ERISA Litigation	Wachovia Corporation	Jul-08

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
181.	Jones v. Novastar Financial, Inc. et al.	NovaStar Financial, Inc.	Jul-08
182.	In Re: IndyMac ERISA Litigation	Indymac Bancorp, Inc.	Jul-08
183.	In Re UBS ERISA Litigation	UBS AG	Jul-08
184.	Taylor et al. v. ANB Bancshares, Inc. et al.	ANB Bancshares, Inc.	Jul-08
185.	Ann I. Taylor v. KeyCorp et al.	KeyCorp	Aug-08
186.	Dudenhoefer v. Fifth Third Bancorp et al.	Fifth Third Bancorp	Aug-08
187.	Pauline Perez et al. v. PFF Bancorp, Inc. et al.	PFF Bancorp Inc.	Aug-08

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188.	Gearren et al. v. The McGraw-Hill Companies, Inc. et al.	McGraw-Hill Companies, Inc.	Sep-08
189.	John Waller and Richard Edwards v. Ray Wood, David Peterson, Douglas Wells, The Committee Under Rockford Products Corporation Employee Stock Ownership Plan, The Committee Under The Rockford Products Corporation Savings and Retirement Plan, and Amcore Investment Group, N.A.	Rockford Products Corporation	Oct-08
190.	Hays v. Constellation Energy Group, Inc., et al.	Constellation Energy Group, Inc.	Oct-08
191.	Mary P. Moore et al. v. Federal National Mortgage Association et al.	Fannie Mae	Oct-08

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
192.	In Re SunTrust Banks, Inc. ERISA Litigation	SunTrust Banks, Inc.	Oct-08
193.	Ninow v. Hartford Fin Svc Group Inc. et al.	Hartford Financial Services Group, Inc. (2008)	Nov-08
194.	Barnes v. General Growth Properties, Inc. et al.	General Growth Properties, Inc.	Nov-08
195.	Michael Dann v. Lincoln National Corp. et al.	Lincoln National Corporation	Dec-08
196.	Obester v. American Express Company et al.	American Express	Dec-08
197.	Patterson v. Pilgrim et al.	Pilgrim's Pride	Dec-08
198.	Jones et al. v. MEMC Electronic Materials, Inc. et al.	MEMC Electronic Materials, Inc.	Dec-08

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199.	Harold S. Crocker, Jr. and Anna Bodnar v. KV Pharmaceutical et al.	KV Pharmaceutical Company	Feb-09
200.	Leo G. Gilliam v. Bank of America Corp., et al.	Bank of America	Feb-09
201.	Wright v. Medtronic, Inc. et al.	Medtronic, Inc.	Feb-09
202.	Walter et al. v. Level 3 Communications, Inc. et al.	Level 3 Communications, Inc.	Mar-09
203.	Mayer et al. v. Administrative Committee of the Smurfit-Stone Container Corporation Retirement Plan et al.	Smurfit-Stone Container Corporation	May-09
204.	In re ING Groep N.V. ERISA Litigation	ING GROEP	Jun-09

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
205.	In re Popular Inc. ERISA Litigation	Popular, Inc.	Jun-09
206.	In re Colonial Bancgroup, Inc. ERISA Litigation	Colonial Bancgroup, Inc.	Aug-09
207.	Leach v. Textron, Inc. et al.	Textron, Inc. (2009)	Aug-09
208.	In re: Int'l Game Tech, ERISA Litigation	International Game Technology	Oct-09
209.	In re Coventry Healthcare, Inc. ERISA Litigation	Coventry Health Care	Oct-09
210.	In Re: YRC Worldwide, Inc. ERISA Litigation	YRC Worldwide, Inc.	Nov-09
211.	In re: R.H. Donnelley Corp. ERISA Litigation	R.H. Donnelley Corp.	Dec-09

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212.	Fulmer v. Klein et al.	Idearc, Inc.	Dec-09
213.	Wilson et al. v. Venture Financial Group Inc. et al.	Venture Financial Group, Inc.	Dec-09
214.	Swetic et al. v. Community National Bank Corporation et al.	Community National Bank Corporation	Dec-09
215.	Lipman v. Terex Corp et al.	Terex Corporation	Jan-10
216.	In Re Sterling Financial Corp. ERISA Litigation	Sterling Financial Corporation	Jan-10
217.	Coppess v. Healthways, Inc. et al.	Healthways, Inc.	Feb-10
218.	Groussman v. Motorola Inc. et al.	Motorola Inc.	Feb-10

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	Name of Case	**Company Name**	**Initial Complaint Filing Date**
219.	Steve Harris et al. v. Amgen Inc. et al.	Amgen	Mar-10
220.	White v. Marshall & Ilsley Corporation et al.	Marshall & Ilsley Corporation	Apr-10
221.	Shane v. Amcore Financial, Inc. et al.	Amcore Financial, Inc.	Apr-10
222.	In re Nokia, Inc. ERISA Litigation	Nokia, Inc.	Apr-10
223.	Smith et al. v. Orion Bancorp, Inc. et al.	Orion Bancorp, Inc.	Apr-10
224.	Robert Bach, et al. v. Amedisys, Inc. et al.	Amedisys Inc.	Jun-10
225.	Guididas et al. v. Community National Bank Corporation et al.	Community National Bank Corporation	Jun-10

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
226.	In re BP ERISA Litigation	BP Corp. North America Inc.	Jun-10
227.	Bredthauer et al. v. Lundstrom et al.	TierOne Corporation	Jul-10
228.	In re GlaxoSmithKline ERISA Litigation	GlaxoSmithKline PLC	Aug-10
229.	Stanley Harris et al. v. First Regional Bancorp et al.	First Regional Bancorp	Sep-10
230.	Thomas Young et al. v. Babettee E. Heimbuch et al.	FirstFed Financial Corp.	Nov-10
231.	Outten et al. v. Wilmington Trust Corporation et al.; Gray v. Wilmington Trust Corporation et al.	Wilmington Trust Corporation	Dec-10
232.	Mary Dalton et al. v. Old Second Bancorp Inc. et al.	Old Second Bancorp, Inc.	Feb-11

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
233.	Coulter et al. v. Morgan Stanley & Co. Incorporated et al.	Morgan Stanley & Co. Incorporated	Mar-11
234.	Kathleen Miller et al. v. Palm Desert Investments et al.	Palm Desert Investments	Mar-11
235.	Borboa vs. Chandler et al.	LandAmerica Financial Group Inc.	Jun-11
236.	Jonathan Alford et al. v. United community Banks, Inc. et al.	United Community Banks, Inc.	Aug-11
237.	Roger Krueger, et al. v. Ameriprise Financial, Inc., et al.	Ameriprise Financial, Inc.	Sep-11
238.	Geroulo v. Citigroup	Citigroup, Inc.	Oct-11
239.	Sansano v. The Bank of New York Mellon Corporation et al.	Bank of New York Mellon Corporation	Nov-11

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
240.	Wald v. Bank of America Corporation et al.	Bank of America Corporation	Dec-11
241.	Gedek v. Perez et al.	Eastman Kodak Company	Jan-12
242.	Scrydoff v. JPMorgan Chase & Company et al.	JPMorgan Chase & Co.	May-12
243.	Boggs et al. v. Chesapeake Energy Corporation et al.	Chesapeake Energy Corporation	Jun-12
244.	Ruben Romero, et al. v. Nokia Corporation, et al.	Nokia Corporation	Sep-12
245.	Theodore Hellmann et al. v. CPI Corporation, et al.	CPI Corporation	Nov-12
246.	In re HP ERISA Litigation	Hewlett-Packard	Dec-12

ERISA Company Stock Case Filings 1997–2013			
	Name of Case	**Company Name**	**Initial Complaint Filing Date**
247.	Sybil Wright, et al. v. Sun Scooter Store L.P. et al.	Sun Scooter Store	Apr-13
248.	Murray v. Invacare Corporation et al.	Invacare Corporation	Aug-13